78-223

No.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BAPTIST HOSPITAL, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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General Counsel,

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Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

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National Labor Relations Board,
Washington, D.C. 20570.

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BAPTIST HOSPITAL, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet officially reported. The decision and order of the National Labor Relations Board (App. C, *infra*) are reported at 223 NLRB 344.

JURISDICTION

The judgment and order of the court of appeals (App. B, *infra*) was entered on May 10, 1978. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board properly concluded that a hospital violated Section 8(a)(1) of the National Labor Relations Act by issuing and maintaining a rule that prohibits employees during nonworking time from soliciting union support in all areas of the hospital to which patients and visitors have access.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. (and Supp. V) 151, *et seq.*) are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *.
>
> Sec. 8.(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * * *

STATEMENT

Baptist Hospital, Inc., is a nonprofit health care institution located in Nashville, Tennessee (App. C, *infra*, 30a).[1] In August 1974, the Union (Local 150-T, Service Employees International Union, AFL-CIO) began a campaign to organize the Hospital's employees, and in October the Hospital revised its existing no-solicitation/no-distribution rules (App. C, *infra*, 33a). As revised, they provided in relevant part (App. C, *infra*, 34a):

> No solicitations of any kind, including solicitations for memberships or subscriptions, will be permitted by employees at any time including work time and non-work time, in any area of the Hospital which is accessible to or utilized by the public. Anyone who does so will be subject to disciplinary action. In those work areas of the Hospital not accessible to or utilized by the public, no solicitation of any kind, including solicitations for memberships or subscriptions will be permitted at any time by employees who are supposed to be working, or in such a way as to interfere with the work of other employees who are supposed to be working. Anyone who does so and thereby neglects his work or interferes with the work of others will likewise be subject to disciplinary action.

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[1] The National Labor Relations Act was amended, effective August 25, 1974, to extend its coverage to nonprofit health care institutions. 88 Stat. 395.

> No distributions of any kind, including circulars or other printed materials, shall be permitted in any work area at any time.

The effect of these rules was to prohibit all solicitation by employees in any area open to the public or in any area where work was performed. Included in the areas on the premises closed to solicitation were a gift shop and the hospital cafeteria, an eating facility used by employees, visitors, and a small percentage of patients, with the permission of their physicians.[2] (App. C, *infra*, 35a.) Solicitation was permitted in employee lounges and vending machine areas, utility rooms, nurses' stations and those rest rooms that are restricted to employees (App. C, *infra*, 36a).[3]

Upon charges filed by the Union, the Board concluded that the Hospital's no-solicitation rule violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), to the extent that it "prohibits employees from soliciting for the Union during their nonwork time in areas of the hospital other than immediate patient care areas"

[2] While there are other non-working areas of the Hospital where employees may purchase food from vending machines, the cafeteria is the only place in the Hospital where hot food may be purchased by employees and others (App. C, *infra*, 36a).

[3] There is an employee lounge in the laundry building of the Hospital, and another lounge on the surgery floor of the Hospital which can hold only 25 to 30 employees (App. C, *infra*, 36a-37a). The Hospital has more than 1800 employees (App. A, *infra*, 2a).

(App. C, *infra*, 22a).[4] In so doing, the Board followed its decision in *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150. It was there held that, while a hospital may lawfully ban employee solicitation, even during nonworking time, in immediate patient care areas such as the patients' rooms, operating rooms, and places where patients receive treatment, a ban on that activity in other areas to which patients and visitors have access is invalid, absent a showing by the hospital that such a ban is necessary to avoid disruption of patient care (*ibid.*). Accordingly, in the present case, the Board ordered the Hospital to rescind its revised no-solicitation rule and to cease and desist from promulgating, maintaining, enforcing, or applying any rule "prohibiting its employees from soliciting on behalf of any labor organization during their nonworking time in any area of [the Hospital] other than immediate patient care areas" (App. C, *infra*, 22a, 90a).

The court of appeals denied enforcement of the Board's order. The court found that the testimony of two physicians and a hospital administrator as to the necessity of creating and maintaining a tranquil atmosphere throughout the Hospital was sufficient to establish "special circumstances" that warranted the Hospital's proscription of employee solicitation in all areas accessible to patients and visitors, including the Hospital's cafeteria (App. A, *infra*, 7a-8a). Rejecting

[4] The General Counsel took no issue with the Hospital's prohibition against employee distribution of literature in any working area at any time (App. C, *infra*, 63a).

the Board's *St. John's* policy, the court agreed with the Tenth Circuit [5] and the District of Columbia Circuit [6] that the Board had failed to give sufficient weight to the special needs of hospital patients and that the Board's balancing of the interests involved was unreasonable and contrary to the intent of Congress in enacting the 1974 health care amendments to the Act (App. A, *infra*, 8a-9a).

REAONS FOR GRANTING THE WRIT

In *Beth Israel Hospital* v. *National Labor Relations Board*, No. 77-152, decided June 22, 1978, this Court held that the Board's policy as enunciated in *St. John's*, *supra*,—"which requires that absent * * * a showing [of a substantial threat of harm to patients] solicitation and distribution be permitted in the hospital except in areas where patient care is likely to be disrupted"—was a permissible "construction of the Act's policies as applied to the health-care industry by the 1974 amendments" (slip op. 15). The Court further held that the Board had reasonably applied that policy in concluding that the hospital in *Beth Israel* had violated the Act by barring solicitation and literature distribution in the hospital cafe-

[5] See *St. John's Hospital and School of Nursing, Inc.* v. *National Labor Relations Board*, 557 F. 2d 1368.

[6] See *Baylor University Medical Center* v. *National Labor Relations Board*, No. 76-1940, decided February 14, 1978, 97 LRRM 2669, petition for certiorari filed July 13, 1978, No. 78-80.

teria, which was used primarily by employees but also by patients and visitors (slip op. 17-22).

The decision of the court below that the Hospital was justified in proscribing employee solicitation in the cafeteria and all other patient-access areas is inconsistent with the holding in *Beth Israel* and with this Court's general approval of the Board's *St. John's* policy followed here. In these circumstances, the judgment of the court below should be vacated and the case should be remanded for reconsideration in light of this Court's decision in *Beth Israel*.

Moreover, since the Court in *Beth Israel*, while generally approving the Board's *St. John's* policy, emphasized that the Board should apply that policy in each hospital case with due regard for "the importance of the employer's interest in protecting patients from disturbance" (slip. op. 20),[7] it is appropriate that this reconsideration be performed by the Board in the first instance. Cf. *Lutheran Hospital* v. *National Labor Relations Board*, No. 77-1289, order entered June 26, 1978, vacating judgment enforcing

[7] The Court explained (slip op. 20-21):

> While outside of the health care context, the availability of alternative means of communications is not, with respect to employee organizational activity, a necessary inquiry, * * * it may be that the importance of the employer's interest here demands use of a more finely calibrated scale. For example, the availability of one part of a health-care facility for organizational activity might be regarded as a factor required to be considered in evaluating the permissibility of restrictions in other areas of the same facility. * * *

a Board order similar to the one at issue here, and remanding case to the court of appeals for reconsideration in the light of *Beth Israel.*[a]

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to that court with directions to remand it to the Board for reconsideration in the light of *Beth Israel Hospital* v. *National Labor Relations Board*, No. 77-152, decided June 22, 1978.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
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NORTON J. COME,
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DAVID F. ZORENSKY,
Attorney,
National Labor Relations Board.

AUGUST 1978.

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[a] The Board intends to request the Seventh Circuit to remand *Lutheran Hospital* to it so that it can perform the reconsideration task initially in that case also.

APPENDIX A

No. 76-1675

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BAPTIST HOSPITAL, INC., RESPONDENT

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Decided and Filed May 10, 1978

Before: PHILLIPS, Chief Judge; LIVELY and ENGEL, Circuit Judges.

LIVELY, *Circuit Judge.* This case concerns the validity of a "no-solicitation rule" in a hospital setting. Following a hearing an administrative law judge concluded that the rule is invalid on its face to the extent that it prohibits solicitations at any time in all areas of the hospital which are accessible to, or utilized by the public. He also held that no unusual circumstances had been established which would justify

the otherwise invalid restrictions contained in the rule. The National Labor Relations Board (the Board) considered exceptions filed by Baptist Hospital, Inc. (the hospital) and agreed with the conclusion of the administrative law judge that promulgation and enforcement of the no-solicitation rule constituted a violation of provisions of the National Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §§ 141, *et seq.* (the Act). The Board's decision and order are reported at 223 NLRB No. 34 (1976).

Baptist Hospital, located in Nashville, Tennessee, is a nonprofit general hospital with 600 beds and more than 1800 employees. For some years prior to 1974 the hospital had enforced a rule against solicitations which applied to the entire hospital premises. In August 1974 a union began attempts to organize employees of the hospital. Also, during that month the Act was amended to give the Board jurisdiction over nonprofit health care institutions.

W. T. Victory, vice president of personnel services for the hospital, testified that the no-solicitation rule was revised with the advice of counsel. The present rule, effective since October 4, 1974, reads as follows:

> No solicitations of any kind, including solicitations for memberships or subscriptions, will be permitted by employees at any time, including work time and non-work time in any area of the Hospital which is accessible to or utilized by the public. Anyone who does so will be subject to disciplinary action. In those work areas of the

> Hospital not accessible to or utilized by the public, no solicitation of any kind, including solicitations for memberships or subscriptions will be permitted at any time by employees who are supposed to be working, or in such a way as to interfere with the work of other employees who are supposed to be working. Anyone who does so and thereby neglects his work or interferes with the work of others will likewise be subject to disciplinary action.
>
> No distributions of any kind, including circulars or other printed materials, shall be permitted in any work area at any time.

In publishing the revised rule the hospital explained its purpose in an employee's handbook as being "to help protect the privacy and rights of employees as well as to help maintain a good working environment and appearance throughout the hospital."

The same witness testified that, as applied by the hospital, the rule prohibits all soliciting and the distribution of literature by employees in any area open to the public or any area where work is performed. Included in the areas closed to solicitation are a gift shop and cafeteria which are open to employees, visitors to the hospital, and with some exceptions, to patients. Solicitation and distribution are permitted, however, in several employees' lounges which contain vending machines, 28 utility rooms, 26 nurses' stations and those rest rooms which are restricted to employees. There was uncontradicted testimony that employees have openly solicited for a union in some

of these areas without interference. Vice-president Victory also testified that there was no change in application of the hospital's longstanding rule against solicitations after October 4, 1974; that the revisions were made in order to be in compliance with the law. He conceded that union activity was "involved" in adoption of the revised rule.

The witness Victory related that when the union commenced its activities some employees were stopped for discussion of the pros and cons of organizing and this caused a disruption of the work force at various places throughout the hospital. The revised rule was required, the witness stated, to prevent disruption of patient care. It would not be in the best interest of the patients to change the rule, in the opinion of Victory, who stated that this was also the consensus of doctors with whom he had discussed the possibility of changing the rule.

Two members of the medical staff of the hospital testified. Both were experienced physicians engaged in private practice. Dr. Russell T. Birmingham testified that it was important to shield patients from emotional problems because the attitude of a patient and the patient's family have "a great deal to do with the recovery" of the patient. The witness stated that the need to maintain a tranquil atmosphere is not limited to treatment areas, since patients are permitted to move around in all areas of the hospital. If union activity should become "volatile or hostile in any form" it was Dr. Birmingham's opinion that

such activity would have a potential for affecting patients and their families adversely.

Dr. Greer Ricketson testified that any "nonprofessional attitude" among hospital employees is upsetting to patients. He stated that patients and their families are disturbed when people who are supposed to be taking care of them seem to have their minds on other things. This witness, who was chief of the medical staff of the hospital at the time of the hearing, stated emphatically that the rule and the reasons for the rule apply equally to all solicitations. Explaining the need for a rule which covers the entire working and public-access areas of the hospital, Dr. Ricketson referred to the present-day mobility of patients and the fact that an event which disturbs the visiting family invariably gets back to the patient.

No evidence was introduced which contradicted in any way the testimony of the two doctors that important medical reasons exist for maintaining the no-solicitation rule of the hospital. The administrative law judge summarized their testimony and found nothing "new or unusual" in it. He concluded that the hospital had failed to establish the existence of unusual circumstances at Baptist Hospital sufficient to warrant approval of a rule which prohibits solicitation in nonworking areas on nonworking time. The Board agreed with this conclusion without discussion, merely holding:

> By promulgating and maintaining a no-solicitation rule which prohibits employees from soliciting for the Union during their nonwork time in

areas of the hospital other than immediate patient care areas, Respondent has violated Section 8(a)(1) of the Act.[1]

Both the decision of the Board and that of the administrative law judge are weakened by their reliance on previous Board orders which have been denied enforcement upon judicial review. The administrative law judge relied almost exclusively on *Summit Nursing Home, Inc.*, 196 NLRB No. 110 (1972), in holding the no-solicitation rule in the present case invalid. This court denied enforcement of the Board's order in its entirety in *N.L.R.B.* v. *Summit Nursing Convalescent Home*, 472 F.2d 1380

[1] Section 8(a)(1), codified as 29 U.S.C. § 158(a)(1), reads:

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

Section 157, referred to above, the codification of section 7 of the Act, provides:

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

(1973). In affirming the decision of the administrative law judge in the present case the Board based its holding squarely on its decision in *St. John's Hospital & School of Nursing*, 222 NLRB No. 182 (1976). The portion of the decision and order thus relied upon was denied enforcement by the court of appeals. *St. John's Hospital and School of Nursing, Inc.* v. *N.L.R.B.*, 557 F.2d 1368 (10th Cir. 1977).

In ordering that the ban against solicitation by non-working employees in the present case be limited to areas of "immediate patient care" the Board in effect held that the hospital had proven "special circumstances" only in relation to those areas. The proof is otherwise. Three witnesses emphasized the fact that many patients, though hospitalized for serious illnesses, are permitted to move freely through public areas of the hospital. Ambulatory patients are permitted to visit with their families and friends in the lobbies and public lounges. They are free to visit the gift shop and, with a doctor's permission, to eat in the public cafeteria. These witnesses, two physicians and an experienced hospital administrator, repeatedly referred to the necessity of creating and maintaining a tranquil atmosphere throughout the hospital for patients and visitors. The testimony of the medical witnesses related this requirement directly to the well-being of the patients. The witnesses made no distinction between areas of immediate patient care and other areas of the hospital. Dr. Ricketson stated that patient care is the only purpose

of the hospital, and anything which interferes with patient care should be forbidden.

Recent Board orders limiting a hospital's right to ban solicitation and distribution to "immediate patient care areas" have been enforced. See *Lutheran Hospital of Milwaukee, Inc.* v. *N.L.R.B.*, 564 F.2d 208 (7th Cir. 1977); *N.L.R.B.* v. *Beth Israel Hospital*, 554 F.2d 477 (1st Cir. 1977), *cert. granted*, —— U.S. ——, 46 U.S.L.W. 3446 (Jan. 17, 1978). We are urged to follow those decisions, but decline to do so. In the setting of a modern general hospital it is difficult to define the areas of immediate patient care. One of the medical witnesses in the present case referred to the importance of the "psychological attitudes" of patients. A patient's attitude toward the hospital and the likelihood of receiving expert care while there depends in part on whether he perceives the staff as concerned exclusively with patient care. This need for professionalism was not limited by the witness to doctors and nurses, but was set forth as a requirement for all employees. Both physician witnesses testified that any activity within the hospital involving volatile or hostile discussion of any subject, whether observed by patients or related to them by visiting family or friends, would be detrimental to their well-being. There is no evidence in this case to justify an "immediate patient care" area limitation on the no-solicitation rule.

We are persuaded that the reasoning of the courts in *St. John's Hospital, supra*, and *Baylor Medical Center* v. *N.L.R.B.*, —— F.2d —— (D.C. Cir. No. 76-1940, Feb. 14, 1978), is correct. In *St. John's* the no-solicitation rule was enforced in all areas of the hospital, including a cafeteria and gift shops to which patients had access. The court there concluded that the Board had failed to give sufficient weight to the special needs of hospital patients and that the Board's balancing of the interests involved was unreasonable. Congressional concern for the special circumstances of hospitals as shown by the legislative history of the 1974 amendments to the Act was noted in both the *St. John's* and *Baylor University* opinions. Both courts related this concern to the necessity of avoiding disruptions in the continuity of patient care. The D.C. Circuit specifically found that this concern was not limited to prevention of disruptions which would be caused by strikes and picketing.

The Board urges, apart from application of the present rule to lobbies, corridors and visitors' lounges, that no ban on solicitation or distribution in the public cafeteria and gift shop is permissible. It is argued that these locations are not involved in the "main function" of the hospital and should be available to nonworking employees for organizational activities. The Board asserts that the commercial and financial justifications which have led it to uphold prohibitions on solicitations in restaurants and retail stores do not apply to a hospital setting. See, *e.g.*, *Marshall Field & Co.* v. *N.L.R.B.*, 200 F.2d 375 (7th Cir. 1952, *amended* 1953); *N.L.R.B.* v. *May Department Store, Inc*, 154 F.2d 533 (8th Cir.), *cert.*

denied, 329 U.S. 725 (1946); *McDonald's of Palolo*, 205 NLRB No. 78 (1973). This same argument was made by the Board and rejected by the court in *St. John's* and by a majority of the panel in *Baylor University, supra.* The Board's position was adopted in *N.L.R.B.* v. *Beth Israel Hospital, supra.* There the court held that the hospital failed to sustain its burden of showing that special circumstances justified a ban on solicitations in cafeteria and coffee shop. However, we conclude that the hospital did carry its burden in the present case. Here the record contains uncontradicted testimony that these areas are part of the total environment of the hospital where the medical needs of patients are served by maintaining a climate free of strife and controversy. We decline to follow *Beth Israel.*

As has been pointed out Baptist Hospital has a large number of areas which are closed to patients and the public where the no-solicitation rule does not apply. This fact alone would not validate an otherwise unlawful no-solicitation rule. However, since we conclude that the hospital did carry its burden of establishing special circumstances, the existence of numerous locations which are open to solicitation further convinces us that the hospital's rule does not deny its employees those rights secured to them by section 7 of the Act.

Both medical witnesses stated that person-to-person solicitation and distribution of literature in the parking lot should have no detrimental effect on patients within the hospital. Vice-President Victory agreed

that solicitation and distribution in the parking lot would not be objectionable so long as the premises were not littered and solicitation did not "create a nuisance." Other rules not in issue here provide the means for preventing noisy mass meetings and littering of the premises. Accordingly, in denying enforcement of the Board's order we construe the hospital's no-solicitation, no-distribution rule to apply only to areas within the various buildings occupied by the hospital and those exterior areas immediately adjacent to entrances used by patients and the public.

The administrative law judge made findings that the hospital had discriminated against one employee for his union activities. Most of his activities were prohibited by the rule which we have found to be valid. However, there is some evidence to support inferences of discrimination against this employee for protected activities unrelated to the no-solicitation rule. Nevertheless, the broad language of the Board's order with respect to "interfering with, restraining or coercing its employees in the exercise of their rights" to be represented by a union is not justified. Enforcement of the order of the Board is denied in its entirety except insofar as it relates to Clyde Russel French, an employee. The order relating to French is incapable of enforcement without modification.

The court was advised at oral argument that Clyde Russell French has died, abating that portion of the order which directs the hospital to offer him employment. The "make whole" provisions of the order appear to rest largely upon the determination of the

administrative law judge and the Board that the hospital's no-solicitation rule is invalid. To the extent that these provisions rest on that assumption, they will not be enforced. We remand to the Board for a specification of what remedial provisions, if any, of its previous order are unrelated to the hospital's no-solicitation rule.

APPENDIX B

No. 76-1675

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed May 10, 1978]

[26-CA-53331-1]

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BAPTIST HOSPITAL, INC., RESPONDENT

ORDER

Before: PHILLIPS, Chief Judge, LIVELY and ENGEL, Circuit Judges.

On petition to enforce an order of the National Labor Relations Board,

This cause came on to be heard on the record of proceedings before the National Labor Relations Board and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that enforcement of the order of the Board is denied in its entirety except insofar as it relates to Clyde Russell French, and the case is remanded to the National Labor Relations Board for a specification of what remedial provisions, if any, of its previous order are unrelated to the hospital's no-solicitation rule.

No costs taxed.

Entered by order of the Court

/s/ John P. Hehman
Clerk

A TRUE COPY
Attest:

JOHN P. HEHMAN
Clerk

By /s/ Dorothy J. Phula
Deputy Clerk

Issued as Mandate: May 31, 1978
COSTS: None

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 26-CA-5331-1 and
26-CA-5331-2

BAPTIST HOSPITAL, INC.

and

LOCAL 150-T, SERVICE EMPLOYEES

INTERNATIONAL UNION, AFL-CIO

DECISION AND ORDER

On August 26, 1975, Administrative Law Judge Morton D. Friedman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief. An *amicus curiae* brief was filed by the Tennessee Hospital Association, Inc.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings,[1] and

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law

conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

We agree with the findings of the Administrative Law Judge except his finding that Respondent did not violate Section 8(a)(1) of the Act by ejecting Clyde French from its cafeteria.[2] In addition, we find that Respondent violated Section 8(a)(3) and (1) by reducing the number of days French has worked since September 16, 1974.[3]

Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

We hereby correct certain inadvertent errors made by the Administrative Law Judge: (1) The Administrative Law Judge at sec. III, C, 3, par. 4, found that two full-time nursing assistants were hired on the second shift between October 10, 1974, and the middle of November, whereas at sec. III, B, 2, par. 24, he correctly found that they were assigned to the third shift; (2) the Administrative Law Judge at sec. III, B, 2, par. 7, found that French had been assigned to work on September 27, 1974, whereas the record shows that he was assigned to work on September 28.

[2] While we agree with the Administrative Law Judge's finding that Respondent's no-solicitation rule violated Section 8(a)(1), we do so for the reasons fully set forth in our opinion in *St. John's Hospital & School of Nursing*, 222 NLRB No. 182 (1976).

[3] The Administrative Law Judge found that in light of his finding that Respondent violated Sec. 8(a)(3) and (1) by failing to offer full-time work to French it was unnecessary to decide this issue.

With respect to the latter finding, it is clear that Respondent has discriminated against French by reducing his days of work as a PRN employee after September 16, 1974. The record shows that prior to French's activities on behalf of the Service Employees International Union beginning in September 1974 he was regularly assigned work. Between February 17 and May 12, 1974, French worked on weekends as a PRN employee during the second or 3-11 p.m. shift. In that 13-week period, he worked an average of almost 3 days each week.[4] At his request, he was subsequently assigned to full-time duty on the second shift from May 13 until September 15. During that 18-week period, he worked an average of 5 days each week.

In the first 3 weeks of September, French distributed handbills and solicited employees to sign union authorization cards. This activity was carried out on his break periods and before or after work in locations such as the hospital cafeteria, the snackbars, the lockerrooms, and on the sidewalks outside the building. It is undisputed that Respondent was fully aware of this activity. Moreover, French testified that when he told Supervisor Lightford on September 16 that he was not worried about Respondent's knowledge of his union activities Lightford said, "We will see about that."

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[4] However, Respondent states that PRN employees are not guaranteed a set number of workdays each week. They are used by the hospital to fill in for absent or vacationing employees or on the basis of patient care requirements.

On September 2, French's request to return to PRN status beginning September 16 was approved. Thereafter, on September 19, Supervisor Lightford scheduled him for second-shift work on September 21, 22, 28, and 29. On September 17, French also requested first-shift work on September 21 and 22. When he repeated his request on September 19, he was told by Lightford that his assigned work for September 21 and 22 had been canceled. On September 20, French received a letter from Respondent postmarked September 16. The letter informed him that not only had the September 21 and 22 assignments been canceled but that he was no longer scheduled to work on September 28 and 29. According to French's credited testimony, this was the first time in his almost 3 years of employment with Respondent that his scheduled work had been canceled.

On September 22, French visited the hospital and asked Lightford if he needed any extra help that day. Lightford told him that he did and referred him to Assistant Director Hamilton. She assigned him to work on the second shift that day and also scheduled him to work on September 27 and 29.

During his break on the evening of September 22, French solicited employees in the hospital cafeteria. Thereafter, on September 26, after soliciting employees and distributing union literature on the sidewalk outside the hospital, French examined the nursing assignment book and discovered that his scheduled work for September 27 and 29 had been canceled. When he entered Assistant Director Hamilton's office, he received a written reprimand which stated that he had violated Respondent's rules by overstaying his break on September 22 and interfering with the work of on-duty employees. He asked her why his scheduled work had been canceled. She told him, "The hospital didn't need employees like me who violated their rules."

Between September 16, 1974, and the date of the hearing in April 1975, French received offers from Respondent for only about 11 days of work. Although he requested PRN work on the second shift only, after September 22 he was given no work assignments on that shift. In spite of his request for weekend work, the few offers which he received were from Monday through Friday. In this regard, French testified that Supervisor Lightford told him on October 13 that he had been instructed not to work French on weekends but only on weekdays when the administrators were around.

We find that since September 16, 1974, Respondent has discriminated against French by reducing the number of his work assignments. In support of this finding we rely on: (1) the substantial decrease in the days of work offered to French since he commenced his union activities; (2) Respondent's sudden and unprecedented cancellation of French's scheduled work assignments; (3) contrary to past practice, Respondent refused to honor French's preference for second-shift work on weekends; (4) evidence that, contrary to Respondent's claim that it was economizing by decreasing the use of PRN em-

ployees after September 22, between that date and the date of the hearing employees have consistently worked overtime on the second shift, including September 21, 27, and 29 when French had originally been scheduled to work; and (5) testimony by French that, when he went into the nursing services office in November to routinely check the assignment book, Mrs. Mathis told him, "I don't think they want you looking at it." Accordingly, we find that Respondent has thereby violated Section 8(a)(3) and (1).[5]

We also find that Respondent violated Section 8(a)(1) by ejecting French from its cafeteria. Around 6 p.m. on January 30, 1975, French went to the hospital to pick up his paycheck and stopped by the cafeteria to see some friends. After a few minutes he spotted Charge Nurse Edens sitting in the cafeteria, but as he walked to her table Assistant Vice President Hampton stopped him. French testified that Hampton told him, "French you know what I told you the last time you were here."[6] Hampton then asked him to leave the cafeteria. When French

[5] The Administrative Law Judge provided for, *inter alia*, a make-whole remedy for French with respect to Respondent's failure to assign him full-time work. The remedy is effective from October 10, 1975, the date when French requested full-time status. Since the time periods covered by that unfair labor practice and the instant unfair labor practice overlap after October 10, our remedy for Respondent's withholding of PRN work from French will cover the period between September 16 and October 10.

[6] Hampton was referring to his role in terminating a conversation between French and two other employees on the evening of December 26, 1974.

inquired, "Isn't this open to the public?" Hampton answered, "Not for you it isn't, French." French refused to leave and proceeded to Charge Nurse Edens' table. A few minutes later, two security guards asked him to leave, whereupon he was escorted out of the building.

The Administrative Law Judge found that Respondent's ejection of French constituted lawful enforcement of its rule that "Employees are not permitted to receive visitors while on hospital duty." We disagree. According to French's testimony, prior to his activities on behalf of the Union, he had on a number of occasions similarly visited other employees. He had never been reprimanded. We have taken into account this testimony, as well as his testimony that Hampton told him that the hospital's public cafeteria was open to everyone but him. We find that Respondent's ejection of French from its cafeteria was an expression of its antipathy towards him because of his union activities. Such conduct is violative of Section 8(a)(1) of the Act.

The Remedy

We have found in agreement with the Administrative Law Judge that the Respondent engaged in conduct violative of Section 8(a)(1) and of Section 8(a)(3) and (1) and, accordingly, we adopt his remedial recommendations in that regard. However, we have found, contrary to the Administrative Law Judge, that the Respondent has engaged in an addi-

tional unfair labor practice in violation of Section 8(a)(1) of the Act. We therefore order that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

In addition, we have found that Respondent has withheld PRN work from Clyde French in violation of Section 8(a)(3) and (1) of the Act. We shall order that he be made whole for any loss of pay or other benefits sustained as the result of the Respondent's withholding of work from him between September 16 and October 10, 1974, computed as provided in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the basis of the foregoing findings of fact and upon the record as a whole, we make the following:

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 150-T, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By promulgating and maintaining a no-solicitation rule which prohibits employees from soliciting for the Union during their nonwork time in areas of the hospital other than immediate patient care areas, Respondent has violated Section 8(a)(1) of the Act.

4. By discriminatorily reprimanding employee Clyde Russell French on October 26, 1974, Respondent has violated Section 8(a)(3) and (1) of the Act.

5. By discriminatorily refusing full-time work assignments to employee French on and after October 10, 1974, the Respondent has violated and is violating Section 8(a)(3) and (1) of the Act.

6. By discriminatorily withholding PRN work from employee French after September 16, 1974, the Respondent has violated and is violating Section 8(a)(3) and (1) of the Act.

7. By ejecting French from its public cafeteria, the Respondent has violated Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Baptist Hospital, Inc., Nashville, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraph 1(a) and substitute in lieu thereof the following:

"(a) Promulgating, maintaining in effect, enforcing, or applying an rule or regulation prohibiting its employees from soliciting on behalf of any labor organization during their nonworking time in any area of its hospital other than immediate patient care areas."

2. Insert the following paragraphs after paragraph 1(b) and reletter subsequent paragraphs accordingly:

"(c) Withholding work from any of its employees for engaging in union or other protected concerted activities."

"(d) Ejecting any of its employees from the hospital's public cafeteria for engaging in union or other protected concerted activities."

3. Insert the following paragraph after paragraph 2(a) and reletter subsequent paragraphs accordingly:

"(b) Make Clyde Russell French whole for any loss of earnings he may have suffered between September 16 and October 10, 1974, by reason of the discrimination against him in the manner set forth in the section of this Decision entitled 'The Remedy.' "

4. Substitute the attached notice for the Administrative Law Judge's notice.

Dated, Washington, D.C.

BETTY SOUTHARD MURPHY, Chairman

HOWARD JENKINS, JR., Member

JOHN A. PENELLO, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT promulgate, maintain in effect, enforce, or apply any rule or regulation prohibiting you from soliciting on behalf of any labor organization during your nonworking time in any area of the hospital other than immediate patient care areas.

WE HEREBY RESCIND the rule promulgated October 4, 1974, to the extent that it prohibits you from soliciting on behalf of a labor organization during your nonworking time in any area of the hospital other than immediate patient care areas.

WE WILL NOT issue reprimands or otherwise discipline you for engaging in union or protected concerted activities.

WE WILL NOT refuse employment to or withhold work from any of our employees because they engage in union or protected concerted activities.

WE WILL NOT eject employees from our public cafeteria because they engage in union or protected concerted activities.

WE WILL offer Clyde Russell French immediate employment as a full-time nurses assistant, or a substantially equivalent position at which position he would have been employed had he not been discriminated against, without prejudice to his seniority or

other rights and privileges he might have acquired, dismissing, if necessary, any persons hired on or after October 10, 1974.

WE WILL make whole Clyde Russell French for any loss of earnings or other benefits he may have suffered by our refusal to offer him full-time work and by our withholding of PRN work from him.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of your right to form, join, or assist or be represented by Local 150-T, Service Employees International Union, AFL-CIO, or any other labor organization, to bargain collectively through representatives of your own choosing, or engage in other concerted or protected activity for the purpose of collective bargaining or any other mutual aid or protection or to refrain from any or all such activities.

All our employees are free to become or remain or refrain from becoming or remaining members of Local 150-T, Service Employees International Union, AFL-CIO, or any other labor organization.

BAPTIST HOSPITAL, INC.
(Employer)

Dated ———— By ————————————
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's office, Clifford Davis Federal Building, Room 746, 167 North Main Street, Memphis, Tennessee 38103, Telephone 901—534-3161.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

Cases 26-CA-5331-1
26-CA-5331-2

BAPTIST HOSPITAL, INC.

and

LOCAL 150-T, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO

William H. Brown, Jr., Esq.,
of Memphis, Tenn., for the
General Counsel.

Joe H. Clark, Esq. (*Elarbee and Clark*), of Atlanta, Ga.,
for the Respondent.

DECISION

Statement of the Case

MORTON D. FRIEDMAN, Administrative Law Judge: Upon an original charge in Case 26-CA-5331 filed on October 11, 1974, and a first amended charge filed in Case 26-CA-5331-1 on December 2, 1974, an original charge in Case 26-CA-5331-2 filed October 15, 1974, and a first amended charge in Case 26-CA-5331-2 filed December 2, 1974, all filed by Local 150-T, Service Employees International Union, AFL-CIO, hereinafter called the Union, the Regional Director

for Region 26 of the National Labor Relations Board, herein called the Board, issued a complaint on December 4, 1974 [1] on behalf of the General Counsel of the Board against Baptist Hospital, Inc., herein called the Hospital or the Respondent alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (29 U.S.C., Sec. 151 *et seq.*), herein called the Act. In its duly filed answer to the complaint, the Respondent, while admitting certain allegations of the complaint, denied the commission of any unfair labor practices.

Pursuant to notice, the hearing in this case was held in Nashville, Tennessee on April 1 and 2, 1975. All parties were represented and were afforded full opportunity to be heard, to introduce relevant evidence, to present oral argument, and to file briefs. Briefs were filed, by Counsel for the General Counsel and the Respondent. Upon consideration of the entire record, including the briefs of the parties, and upon my observation of each witness appearing before me, I make the following:

Findings of Fact

I. The Business of the Respondent

The Respondent, a corporation doing business in the State of Tennessee, operates a nonprofit hospital providing health care services in Nashville, Tennessee. During the 12-month period immediately preceding

[1] This complaint was amended at the hearing as hereinafter set forth.

the issuance of the complaint herein, a representative period, the Respondent received gross revenue for services rendered to patients at the said Hospital in an amount in excess of $250,000.

It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

It is admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Background and Issues*

In substance, the complaint, as amended at the hearing, alleges that the Respondent promulgated, maintained and enforced an over broad no-solicitation, no-distribution rule in violation of Section 8(a)(1) of the Act. The complaint further alleges that the Respondent discriminated against employee Clyde Russell French in violation of Section 8(a)(3) of the Act by restricting and reducing the number of hours French worked each week and issuing a written warning to French for engaging in protected concerted and union activities. Additionally the complaint alleges that the Respondent violated Section 8(a)(1) by attempting to deny French access to the Respondent's cafeteria and causing security guards to reject French.

The Respondent's answer, which denies the commission of any unfair labor practices, is supported by the Respondent's contentions that because of "unusual circumstances," the Respondent's Hospital being a health care institution, the aforesaid no-solicitation, no-distribution rule is reasonable and proper and not in violation of any section of the Act. Furthermore, Respondent contends that French's hours of work were not reduced because of French's union activities but rather because of economic conditions within the Hospital and the necessity to reduce operating costs as much as possible. Moreover, Respondent contends that all its other actions toward French were necessary and proper in order to safeguard the treatment of its patients and were merely carried out as part of its program of health care and were necessary to insure the same.

B. *The Facts*

1. The No-Solicitation, No-Distribution Rule

For some years before October 4, 1974, the Respondent maintained a no-solicitation rule at its Hospital which read as follows:

> In order to protect employees from any form of solicitation, raffle, charity drives, etc., it is strictly prohibited for anyone to solicit patients or visitors while on hospital premises without written approval of the Administrator. Violation of this policy will subject employee to disciplinary action. Employees who discover persons making unauthorized solicitation should report this immediately to their supervisor.

W. T. Victory, Respondent's vice-president of personnel services, testified that the foregoing no-solicitation rule was basically designed to keep salesmen out of the Hospital.

In approximately early August 1974, the Union commenced a campaign to organize the Respondent's hospital employees. Victory testified that he became aware of the union campaign at approximately mid-August 1974 when he observed representatives of the Union handbilling outside the Hospital.

Also, on August 27, 1974, the National Labor Relations Act, herein called the Act, was amended to give the Board jurisdiction over all health care institutions regardless of whether they were profit or nonprofit institutions.[2] Victory testified that enactment of this amendment to the Act necessitated a change in the foregoing no-solicitation clause because the Respondent's Hospital, which had hitherto been exempt from the assertion of jurisdiction by the Board, now became subject to the Board's jurisdiction and to the various provisions of the Act and the Board's interpretations of the Act.

Because the Respondent was concerned over the Union's organizational activities and the possible results thereof, and because of the change in the Act, which rendered the foregoing no-solicitation rule in-

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[2] Public Law 93-360, 93rd Congress, S. 3203, August 27, 1974.

valid, the Respondent requested its counsel to study and survey its personnel policies. Respondent's counsel revised the no-solicitation rule so that it would meet both of the foregoing exigencies. The revised no-solicitation rule reads as follows:

> The solicitation and distribution policy of Baptist Hospital has been revised. This has been done to help protect the privacy and rights of employees as well as to help maintain a good working environment and appearance throughout the hospital. The policy is as follows:
>
> "No solicitations of any kind, including solicitations for memberships or subscriptions, will be permitted by employees at any time, including work time and non-work time in any area of the Hospital which is accessible to or utilized by the public. Anyone who does so will be subject to disciplinary action. In those work areas of the Hospital not accessible to or utilized by the public, no solicitation of any kind, including solicitations for memberships or subscriptions will be permitted at any time by employees who are supposed to be working, or in such a way as to interfere with the work of other employees who are supposed to be working. Anyone who does so and thereby neglects his work or interferes with the work of others will likewise be subject to disciplinary action.
>
> No distributions of any kind, including circulars or other printed materials, shall be permitted in any work area at any time."

As admitted by Respondent's Vice-President Victory, employees are prohibited for either soliciting or

distributing union literature in any area open to the public or at any area were work is performed. A work area would be defined as one in which the Hospital's employees render patient care. Victory admitted that solicitation as, interpreted by the foregoing no-solicitation rule, would include the distribution of union cards. The Hospital, according to Victory, does not permit solicitation or distribution under the above rule in the Hospital's gift shop, the main cafeteria on the first floor of the central building of the Hospital which is open to the public visiting patients in the Hospital, the Hospital's lobbies, public restrooms, entrances and sidewalks leading to the entrances and parking lot located across the street from the Hospital. It was admitted by Victory that no patient care is performed in any of these areas, although patients do visit some of the areas upon occasion if they are sufficiently well to do so. Normally this would include ambulatory patients but other patients could possibly also visit some of these areas.

As noted above, the gift shop that is located on the first floor of the central or main building of the Hospital and is open to the general public without restriction as is the main cafeteria which seats 100 persons. Although some small percentage of the patients eat in this cafeteria, they must receive permission to do so. The only employees who work in the cafeteria area are those who work in the dietary department. These employees work in the kitchen and in the cafeteria serving line. Normally, other employees enter the cafeteria only for meals or coffee

breaks. Victory admitted that the cafeteria is considered an area where employees and the general public may eat and relax. Although three meals a day are served in a cafeteria, it is open 24 hours a day and food may be purchased from vending machines located in an adjacent area when the serving line is closed down. Additionally, although there are other non-working areas in the Hospital in which employees may purchase food from vending machines, the cafeteria is the only place in the Hospital where hot foods may be purchased by employees and others.

According to Victory employees are allowed to solicit in any area which is closed to the public and which is not considered a work area. Such areas are the employee's lounge in the laundry building and on the fourth floor lounge in the main building. Also included would be the utility rooms and the nurses stations.[3] The two employee lounges are equipped with vending machines where food and other items may be purchased by employees. The lounge in the laundry building is some distance from the main patient care in the Hospital and therefore not readily accessible on short breaktime to the employees who work in the main building of the Hospital. The other lounge, which is rather small and will hold only some

[3] The nurses stations are shut off from the public by glass partitions. However, all of the patient's records are kept and consultations between the various individuals responsible for patient care take place at the nurses stations. It is difficult to understand how this is not considered a work area where solicitation is permitted under the above set forth no-solicitation, no-distribution rule.

25 to 30 employees, is located on the fourth or surgery floor of the Hospital and is used for the most part only as a relief area for those individuals whose duties are concerned with the surgery area.

Although the foregoing does not completely describe all of the Hospital areas, it describes those main areas with which this proceeding is concerned.

In connection with the application of the no-solicitation, no-distribution rule, it has been hereinabove set forth that the Hospital halls and lobbies which are located on the side and the front of the Hospital on 20th Avenue and 21st Avenue in Nashville are considered off limits for distribution or solicitation because they are utilized by the public although they are not patient treatment areas. Accordingly they are not considered work areas. Additionally, there is a parking lot maintained by the Respondent across the street from the main entrance of the Hospital on 20th Avenue. This is for permitted parking by both employees and visitors. These areas are also off limits for solicitation and distribution because of a utilization by the public although they are not work areas.[4]

2. Clyde Russell French—Union Activities —Respondents Reactions

French began to work for the Respondent as a full-time nursing assistant on November 20, 1972. He continued to work as a full-time employee until Feb-

[4] All of the foregoing from testimony of Respondent's Vice President of Personnel, W. T. Victory.

ruary 1974. At that time French, a student full-time at Vanderbilt University in Nashville, decided that it would be better for him to work only part-time at the Hospital. He therefore requested of his supervisor, Melvin Lightford, supervisor in charge of training and of nursing assistants, that he be changed to a PRN employee. PRN employees are used, as needed, as contrasted with regular part-time employees who work at regular assigned times each week. As a PRN, after February 1974 until May 1974, French normally worked 3 days a week (Thursday, Saturday and Sunday) on the 3 to 11 p.m. shift. According to French, he would know what times and days he would work by consulting with Lightford who would schedule him a week or 2 weeks ahead. This schedule was placed on a Nursing Assistants Assignment Sheet.

The records establish that during the period from February to May 1974, French did not regularly work exactly 3 days, 8 hours a day, each week. The records show that although for 8 weeks during that period French worked 3 days, there were 3 weeks in which he worked only 1 day, 1 week in which he worked 2 days and 1 week in which he worked 4 days.[5]

At French's request, the school year having come to an end, French requested that he be reassigned and was returned to full-time status as a nursing assistant on May 13, 1974. Also, at his request, French was retained on the 3 to 11 shift during this

[5] These figures were adopted from French's timecards which were received in evidence.

full-time working period. He continued in this capacity until, again, at his request on August 29, 1974, French was returned to the PRN pool for the 3 to 11 shift. This was because French was again attending classes as a full-time student at Vanderbilt University. According to the request form signed by French on August 29, 1974, that he be a PRN on the second, 3 to 11 shift, and that he would be available for work from the PRN pool affective the week of September 16, for work on that shift on Thursday through Sunday. The request to transfer to PRN status was granted by Addie Hamilton, assistant director of nursing services. However, as will be set forth below, French did not receive the days or hours of work requested by him during the period following his transfer to PRN status in September 1974.

Sometime in August 1974, while dining with Supervisor Lightford, French learned that the Union was beginning to conduct a campaign to organize the Respondent's employees. This information was given to Lightford and French by another employee. In Lightford's presence, French stated that he thought the Union would be a good idea.[6] Shortly thereafter, French obtained an information card from the Union on which French indicated that he would be willing to undertake committee work. He mailed the card back to the Union and the Union mailed to him, in return, an authorization card which French filled out and signed and returned to the Union.

[6] Lightford did not deny any of this during his testimony.

On September 3, 1974, French called the union hall and informed the union officials that there was much pro-union sentiment at the Hospital. French further stated that he would be willing to help and wanted to meet with the officials to find out what he could do in organizing the employees. Thereafter, pursuant to his request, French met with two union officials. At this meeting, French was given a number of authorization cards and union literature. During the next few weeks, French distributed these cards at the Hospital during his break periods. French estimated, in testifying, that he distributed about 200 cards, normally in the cafeteria. He also made some distribution in the snack bars and locker rooms. Additionally, French distributed cards outside the building. Normally this distribution was made during French's break periods, after work or before work.

According to French, on September 15, in the treatment room of station 8 central south, Lightford told him that a Mrs. Mathis had told Miss Hamilton, assistant director of nursing services, that French was the leading union instigator at the Hospital. French answered that he figured that they knew about the matter of French's union activities but that French was not worried because the law would protect him. Lightford then said something to the affect "we will see about that." [1]

[1] The foregoing from the uncontroverted testimony of French. Although, as hereinafter related there were discrepancies in portions of French's testimony and contradictions which would seem to indicate that at least, in part, he had

According to French, on September 9, after French had applied and was given permission to return as a PRN nursing assistant, he was assigned by Lightford to work on the second shift on September 21, 22, 27 and 29. As noted above, the second shift is the shift which works from 3 p.m. to 11 p.m. On September 17, because French's father was ill and dying and French needed the money, French called Lightford at the Hospital and asked the latter if he could also work the day shift on September 21 and 22. Lightford indicated that he would check out the request to see if the work was available. Lightford also asked French at that time if the latter had received a letter from the Hospital. French answered that he had not. Lightford then told French that there was a letter in the mail for French but did not reveal the contents of the letter. Nor did he indicate in any way that French's schedule had been changed.

Again, on Thursday, September 19, French telephoned Lightford and asked the latter if he had talked to the day supervisor about French's working the first shift on the 21st and 22nd of September. During that conversation, the subject of the letter came up again. French asked Lightford to what address the letter had been sent. French then learned

faulty recall, to the extent that I credit French, or any other witness, only in part, I do so upon the evidentiary rule that it is not uncommon "to believe some and not all of a witness's testimony." *N.L.R.B.* v. *Universal Camera Corp.*, 179 F.2d 749, 754 (C.A. 2). Additionally, in this instance, Lightford, in testifying, did not deny this conversation with French, or its contents.

from Lightford that the letter had been sent to an old address. He thereupon gave Lightford his new address. During that conversation, Lightford told French that his days were being held up for the coming weekend and further stated that the letter would explain it. French testified that he did receive the letter in question on September 20. The letter, which bore no date, but which was mailed on September 16, 1974, according to the certified receipt, stated that after review of the work schedule for nursing assistants in the PRN pool, Hamilton, the assistant director of nursing, found that they did not need French's services on the days he was scheduled to work and that the Respondent would let French know of those times in the future on which there was a need for his services.

On Saturday, September 21, French stationed himself outside the 20th Avenue entrance to the Respondent's Hospital, on the sidewalk, and distributed handbills together with union authorization cards. While he was so acting, he saw Addie Hamilton, the assistant director of nursing services, and exchanged greetings with her. The following day, September 22nd, French returned to the Hospital, to pick up a book and to see Lightford. After arriving at the Hospital about 2:30 p.m., he saw Lightford in the locker room and asked the latter if he needed any extra help that day. Lightford said that he did because only four people were there. French asked Lightford if he could work. Lightford answered that he would have to see Miss Hamilton. Lightford left,

returned and informed French that Miss Hamilton was on the telephone. About 45 minutes later, French was called into Hamilton's office. Hamilton then assigned work to him for that day and also for Friday, September 27 and Sunday, September 29.

During that conversation at which Lightford, Hamilton and French were all present, according to French there was no mention of the letter which had been sent to him. However, Hamilton testified that she asked French if he had received a letter and he specifically stated that he had not. Lightford's testimony in regard to what French stated when Hamilton asked him if he had received the letter is rather vague and in some respects contradictory to both French's and Hamilton's testimony. However, because French did report for work on the 21st, when he was originally scheduled to do so, and by reason of the fact that French went to the Hospital to ask for work on the 22nd, it is more than likely that French was not asked or, at least, did not deny that he received the letter. I therefore credit French in this respect.

In any event, French was assigned to work on the the 3 to 11 shift on that day, September 22. That evening, at about 9 p.m., while French was on his break, he spoke to two dietary employees in the cafeteria. These employees were Jessie White and Alma Johnson. According to French he spoke to these two people for just a brief few minutes and then moved on to another table where he spoke to other employees. French estimated in his testimony,

that he spent approximately 15 minutes on break that night. However, he later admitted that he did not know exactly how long he had stayed on the break and very possibly he did overstay his 15 minute break on that night.

Jessie White, one of the two dietary employees to whom French spoke, testified that the conversation with French occurred at a time when she and Johnson were sitting at a table in the cafeteria, although not on break, after the serving line had closed down. They were resting and smoking cigarettes when French spoke to them. It is obvious, therefore, that French had no way of knowing that these individuals were not on break when he spoke to them. However, in that conversation French did solicit their signing union cards. Their conversation with French ended when Mildred Underwood, the food service supervisor, called to ask White to take a tray to a patient upstairs on a late order. White's estimate of the time that French spent with her and with Johnson was approximately 10 to 15 minutes. White never complained to any Hospital official that French had bothered her in any way or that French had detained her in any way from her work or that he had anyway of knowing that she was not on break at the time he spoke to her. Additionally, White was not in anyway ever reprimanded for having talked with French about the Union during that period.

Although French was unaware of it, while he was talking to White and Johnson in the cafeteria on his break on September 22, he was being observed by Food Service Director Underwood. The details and

the reason for this observation of French by Underwood are hereinafter related.

On September 26, between 6:30 and 7:30 a.m., French again was stationed at the entrance to the Hospital where he again passed out union literature and union authorization cards. On that same day, at about 4 o'clock in the afternoon, French entered the nursing service office to pick up his paycheck for the previous week. When he asked for his paycheck he was told that he would have to talk first to Miss Hamilton. At that point, French looked at the timebook and noticed that he had been removed from the scheduled work for September 27 and 29. He thereupon went into Hamilton's office, where the latter was filling out a form. When Hamilton finished she handed the completed form to French. The form, which was a disciplinary notification, stated that French on September 22, 1974 violated two hospital rules in that (1) he had overstayed his break on September 22 for 10 minutes; that he arrived in the cafeteria at 9:05 and stayed until 9:30 whereas the break was to have been, according to hospital rules, only 15 minutes; (2) during the break in the cafeteria as aforesaid, two dietary employees were stopped while they were on duty and French held a conversation with them until their supervisor asked them to deliver late trays which were waiting. French refused to sign the form after it was given to him although, he made a copy. According to French, the form that he saw at that time stated the violations had occurred on September 26. However, the form

which was introduced into evidence bore the date of September 22.

French testified, without contradiction, that before receiving this reprimand he had not been spoken to by anyone with regard thereto. In any event, before leaving Hamilton's office on that night, he asked why his work for September 27 and 29 had been cancelled. Hamilton told him "the hospital didn't need employees like me who violated their rules." It should be noted that Hamilton, in testifying, did not deny this comment. However, she emphatically stated that she did not inform French that he was either fired or terminated. However, Hamilton testified that she had received complaints from a number of charge nurses and even dietary employees that French had bothered them while they were on their breaks or at dinner in the cafeteria. Hamilton specifically testified that the emergency room charge nurse had complained to her about Hamilton's annoying her in the cafeteria. Hamilton also mentioned the names of three other charge nurses who had told Hamilton that French had bothered them while they were eating their dinners in the cafeteria by sitting down next to them, talking to them, and seeking to distribute literature to them. Hamilton testified that, in one instance, the charge nurse on 3400 told Hamilton that French had such body odor that the nurse had to get up and leave; that she could not sit there. This nurse asked Hamilton if Hamilton could not do anything about French's bothering them while they were on their meal break. Hamilton further stated, on cross-

examination, that at least four people personally told her of French's annoying them. She specifically stated the names of these individuals and their work stations. Hamilton further testified that she had had these complaints about French off and on for a period of approximately 2 months before the reprimand was given to French.

However, upon further cross-examination, Hamilton was asked why she had not spoken to French about any of the foregoing matters. She stated that she did not do so because she did not witness the incidents herself, she could not prove them and was also told about it after a fact. It should be noted, in connection with the foregoing, that none of the nurses who allegedly complained about French to Hamilton were called to verify Hamilton's testimony with regard to these alleged complaints. It would seem that the allegations of French annoying these individuals could have been proven by the nurses themselves. Therefore, I find very thin Hamilton's reasons why she did not speak to French about the complaints, and do not credit her testimony in this regard.

The testimony of W. T. Victory, Respondent's vice president of personnel services, is somewhat confusing with regard to knowledge of French's activities in allegedly overstaying his breaks. On direct examination by Counsel for the General Counsel [8] Vic-

[8] Victory was examined by Counsel for General Counsel as an adverse witness pursuant to Section 43(b) of the Federal Rules of Civil Procedure.

tory was asked if prior to September 22 he had received any reports that French might be overstaying his breaks. Victory's answer was that he did not have any record of it and that he did not remember whether anyone told him prior to that time that French was overstaying his break. On being cross-examined by Respondent's counsel, however, Victory testified, in response to leading questions, that he had been receiving complaints that French was overstaying his breaks and that other personnel would have to have French paged because they could not find him. During his examination, Victory also stated that he had known that French was passing out union literature at the gate to the Hospital and had also been passing out literature to individuals in the Hospital. Victory stated that it was because of these reports that he had directed Mildred Underwood on September 20, 1974, Underwood being the Respondent's food service supervisor, to observe French when he was in the cafeteria and to time his stays in the cafeteria, principally on the time that French spent during his breaks. Victory admitted that he had made no request that Underwood time any other employee of the Hospital because, according to Victory, French was the only employee who had been reported to have overstayed his breaks.

After asking Underwood to observe French, Victory received a report from Underwood that on the night of September 22 French had taken the usual 45 minute lunch dinner break and then from 9:05 until 9:30 p.m. French had taken a break in the

cafeteria. French was reprimanded therefore after this report was made to him. Victory further testified that the employees to whom French was speaking were verbally reprimanded but no written report was made of it. However, as noted above, this conflicts directly with the testimony of employee Jessie L. White, one of the two dietary employees with whom French spoke in the cafeteria on the night he allegedly overstayed his break period. Victory did testify, however, that another employee had been discharged at some other time for overstaying the break period.

Other employees who testified with regard to the written reprimand given to French were Hamilton and Underwood. As noted above, Hamilton is the assistant director of nursing services and the individual who made out and handed to French the written reprimand. She testified that the reason French was timed on the night of September 22, was because all supervisors were advised to do so on about September 16 to make sure that no employees were overstaying their breaks. She admitted however that she, herself, had never received any specific instructions that a time study was to be conducted with regard to how long French spent on his breaks. She further testified that if Victory had given such instructions they did not come through her although they ordinarily would have come through her. This was so because she was the assistant director of nursing services and would have been the chief individual supervising French and who would have been

the individual directly involved in assessing French's conduct.

Underwood testified that she was the individual who timed French's break stay in the cafeteria on the night of September 22. She stated that she did so because of orders she had received from her supervisor either in June or July 1974. The instructions which Underwood received were to time all personnel to see who were overstaying breaks. However, nowhere in her testimony did Underwood relate that she received specific orders from Victory to single French out for time study. Additionally, Underwood admitted, in testifying, that she had never noticed French in the cafteria before the night of the 22nd and the reason that she noticed him that night is because he was soliciting and passing out literature. However, she also testified that the reason that she was looking at French, that she knew how long French had stayed in the cafeteria, was that because she happened to look at the clock as French entered. When asked again as how she came to clock French, Underwood answered that she just happened to look at the clock and notice when French came in and she happened to notice when he went out because he was carrying a tray and she was responsible for trays falling off the return area on which soiled or used trays were placed. Underwood also testified that French had stayed only 45 minutes on his dinner break. How she would have known this without having specifically noticed French, whom she said she did not notice before he solicited for the Union, is questionable.

Accordingly, I find and conclude that Underwood was specifically told by someone to check French on the night of September 22. Additionally, Underwood stated on further cross-examination that she did not particularly single French out but watched everybody on the night in question. When further questioned as to how many people came through the cafeteria during the time that French took his break period that night she estimated about 75 to 100 people. Then, Underwood further stated that even though other people came and left the cafeteria at various times she would know if any of them had overstayed their breaks. I find this testimony to be incredible.

At about the time all the foregoing was happening, French's father became seriously ill, and, a short time thereafter, died. French was, therefore, short of funds and, according to his credited testimony, he was forced for financial reasons to withdraw from full-time studies at Vanderbilt University and, on October 10, applied for full-time employment as a nursing assistant by submitting a written request. This request form which was signed by French on October 10, stated that he requested full-time status available any shift, 7-3, 3-11 or 11-7 immediately. The request stated that French's father was seriously ill and that he had to withdraw from school and needed to start working full-time.

Later, according to French in the middle of November, he informed Victory that he would prefer the 3 to 11 shift for full-time work. However, French did not insist on this and did not, in fact, withdraw

his request for full-time work on any shift. French testified that the reason that he was still able to work any shift although he would have preferred the 3 to 11 shift was that he had obtained a position working at a laboratory at Vanderbilt University. However, he further stated, that he could accommodate to this and could arrange his hours of work at Vanderbilt to fit into any schedule given to him by the Respondent.

In any event, French's request was never acted upon and he was never placed on a full-time basis. Respondent's records reflect, however, that between October 10 and the middle of November, the date estimated by French on which he informed Victory that he would prefer the third shift, five employees were hired as full-time nursing assistants. Two of these individuals were hired for the third shift. Additionally, from the time that French made his application on October 10 for full-time nursing assistant work until the date of the hearing herein the Respondent's records reveal that a total of 12 full-time nursing assistants were employed and that even after the middle of November 1974, one full-time nursing assistant was rehired for the third shift.

On the same day on which French made application for full-time work, he was informed in the cafeteria by a fellow employee that the no-solicitation rule, hereinabove set forth, had been posted. Upon receiving the information, French left the cafeteria, followed by his immediate supervisor, Lightford, who explained to French that the Respondent did not

want French to go upstairs alone. French proceeded to the fourth floor of the main building of the Hospital where he had been informed the no-solicitation rule was posted. French, accompanied by Lightford went to the fourth floor and preceeded down the hall to the place where the employees' timeclock is located. Near the timeclock was a display case in which was posted the no-solicitation rule herein referred to. French and Lightford had a short discussion with regard to the rule and French then proceeded to copy the rule. At this point, Lightford was paged and had to leave, leaving French alone. As French was busy copying, a fellow employee, Jack Johnson, approached and asked French if the latter wanted the rule. French indicated that he did, whereupon Johnson inserted two fingers between the bulletin board glass cover and the back of the bulletin board, removed the notice and handed the same to French. French took the notice and left the building.[9]

According to Victory, the area through which French passed in order to copy the notice, as aforesaid, is a sterile area through which employees may not pass in street clothes. This is because, according to Victory, it is immediately adjacent to the operating room area of the Hospital. However, as noted above, French was accompanied through this area by Lightford who said nothing to French when they were passing through the area and in no way attempted to stop French from proceeding through the area, merely

[9] From uncontroverted testimony of French which testimony is hereby credited.

stating that the Respondent did not want French wandering through the Hospital unaccompanied.[10]

As noted above, no action was taken on French's application to become a full-time nurses aide dated October 10, 1974. However, as testified by Hamilton, French was not discharged or laid off at any time, including the date of September 26, when French was reprimanded. However, although retained on a PRN status, French worked only 1 day during the week ending November 17, 1974, 1 day during the week ending December 22, 1974, 1 day during the week of January 26, 1975, 1 day during the week of March 16, 1975, and 1 day during the week of March 23, 1975. Thus, he worked only for five approximately 8-hour shifts from October 10, 1974, the date French applied for full-time employment, until the date of the hearing herein. This record of 5 days work for the total of these foregoing months when compared to rather regular 2 to 3 day work periods which French received as a PRN from February to June 1974 leads inevitably to the question of why French received so little work after October 10, 1974. The conflicting testimony and the explanation for this as given by French and as given by Victory and Hamilton must hereinafter be resolved. Because the testimony regarding French's assignments after his union activity became known to the Respondent is rather lengthy, the following is but a summary of such testimony.

[10] Lightford did not testify with regard to this incident. Accordingly, I credit French.

According to French, although he was working as a full-time employe at the chemistry laboratory at Vanderbilt University, he nevertheless made it known to Victory and to other Respondent officials that he was available for work. This is outlined above in French's explanation as to the reasons for his filing for full-time employment on October 10 on any shift and the notification during the middle of November to Victory that he would prefer assignment as a full-time employee on the 3 to 11 shift. French testified further that during this entire period of time from, October 10 until the date of the hearing, he was either not asked to report for work at all, or else received word of his possible assignments either by letter or by verbal communication and messages left for him at the laboratory at Vanderbilt too late for him to arrange to be at the Hospital when he was scheduled to work in the chemistry laboratory, as aforesaid. He further stated that there was a time, either in November or December, when his father ultimately passed away and he was unable to report because he went to his father's funeral out of town and was caught in a snow storm on the way back. He stated, however, that he frequently checked with Lightford with regard to the scheduling and was not told by Lightford of any assignments except on those days on which he ultimately worked. He said this contrasted with the previous spring of the year when he was told by Lightford a week in advance on which days he would be working.

On the other hand, Victory testified that there were a number of reasons why French worked so seldom after September 26, 1974, and why French was not made a full-time nurses assistant. Victory testified that there are three classifications of employees. The first classification are full-time employees who work regularly scheduled workdays and have full, regular scheduled workweeks. A part-time employee, a second category, is an employee who works a regular schedule for less than a full week. In other words such employee would work the same number of hours on the same day each week. Then, according to Victory, there is the third classification in which French was placed upon the latter's request. This is the classification of PRN, who according to Victory, "are people that we usually call in, in the event we have absences or vacations to fill or, these type things, but we can call these people just as the term denotes, as they are required. They do not have any set number of days to work, they do not have any certain days to work. A PRN person might be called 15 minutes before a shift. Someone calls in and says 'I can't come in' or is in an accident, and we might call a person with a PRN status vith very little notice."

This testimony by Victory was supported by the testimony of Hamilton, assistant director of nursing services, who explained that, "PRN personnel are used when they are needed in any capacity from R.N.'s to supervisors. Does that answer the question? They are used to fill in when we have a need for

them." When asked if PRN's were guaranteed or promised any number of hours per week, or month, or year, Hamilton answered in the negative. Additionally, Victory testified that the PRN pool had an excess of 100 individuals.

As noted above, French testified, without any contravention, that when he was a PRN from the period of February to June 1974, he worked almost consistently the same hours each week and was given fairly steady work. The Respondent's records show that French was not given the same amount of work time each week. Moreover, French did admit, on cross-examination, that Lightford, his immediate supervisor, assigned the work to him on a week to week basis and that he was not necessarily assigned the same amount of work each week even during the earlier period.

According to Victory, increased costs of operating the Respondent's hospital became manifest doing 1974 and because of those increased costs measures had to be taken by the Respondent in order to economize. Victory testified that one of the measures taken was to require the approval of filling all vacancies only by the Hospital president or vice president in order to cut down on personnel of the cost of the operation of the Hospital. Energy costs, another factor, have, over the period of time involved in this proceeding, been reduced considerably. Additionally, with regard to the personnel, there are fewer employees now quitting their employment at the Hos-

pital. This has resulted in a decrease in the turnover of personnel of 30 percent. Moreover, according to Victory, qualified, experienced personnel have been seeking employment at the Hospital in large numbers during this same period.

Hamilton testified that the day that French was transferred from full-time to PRN status at his own request, September 16, 1974, the Hospital's executive committee issued instructions to all supervisors to examine carefully the assignments and use of PRN's and to make certain that they were absolutely necessary before assigning work to them in order to avoid unnecessary costs.

French, as hereinbefore set forth, admitted that there were a number of times that he was offered work after September 26, 1974, when he was unable to work for reasons that the notification came too late, or that he was already committed to work in the laboratory at Vanderbilt, or that he did not receive the request for one reason or another. When questioned by Respondent's counsel as to how many total days he was offered work as a PRN after September 22, French said that he counted a total of 9 days. However, he admitted that he only worked 5 of these 9 days. These were the 5 days heretofore referred to that French worked after the commencement of his union activity.

Introduced into record at the hearing were the nursing assistant assignment sheets for the Hospital commencing with the week of August 12, 1974, through the week of March 24, 1975. These, evi-

dently, represent not the actual days worked but the days assigned by Lightford to the nursing assistants. While these sheets indicate very strongly that French received only a very few assignments, they also indicate that commencing with the latter part of September, 1974 only a minimal number of hours of work were given for the entire period to any PRN nursing assistants. In fact, the only nursing assistant who consistently received work almost each week and, who was also a PRN, was Michael Sykes, who evidently was very well qualified to work in the emergency room, where Sykes was almost consistently assigned. There were also two other PRN nursing assistants who received more work than did French. These individuals were Woodfin and Burn. These individuals were assigned work for the most part on weekends, the very times on which French expressed his desire as a PRN to work. However, even their assignments were not consistent, and it is not clear that they actually did work in uniformity with the assignment sheets.

Additionally, it should be noted that although French requested as a PRN to work weekends most of the assignments he did receive for the period from late September 1974 through March 1975 were assignments for work during the week. Thus, the times when French requested work on the weekends were not given to him. French testified, without any contradiction from Lightford, that Lighford told French the reason the latter was not assigned weekend work was that Respondent did not want French working

in the Hospital at a time when hospital officials were not there to observe French's activities.

The Respondent, aside from the economic situation as outlined above, offered additional testimony with regard to the quality of French as an employee, presumably to show that there were additional reasons why French was not given more work. In the first place, according to Respondent's witnesses, French as a PRN was treated no diffierently than any other PRN. Heretofore set forth is the data which shows that there were almost no PRNs used to any extent between September 26, and the date of the hearing herein. In addition, French's own testimony contains admissions that there were times when he was called to work when he was unable to do so or when word of request by the Respondent for French to report for duty as a nurses assistant was not conveyed to him until it was too late for him to make plans and to arrange with the laboratory in which he was working full time for time off to report for work at the Hospital. French maintained in his testimony that there was no difference between a PRN or a part-time employee. To an extent, this is borne out by the fact that, as pointed out by the Counsel for the General Counsel, there is no mention of PRN's in the Employees Handbook, but only of part-time employees. Additionally, a personnel change of status sheet introduced into evidence showing the status of French's transfer to "part time," uses the word "part time" in one instance and the form does not have a provision on the form to check for type of

employment for PRN. What is checked on the form is a box along side of which is printed "part time." However, on the same form toward the bottom, is a written notation as follows: "37-PRN" and in the same section "vacation accrual date-00000" having an effective date of February 11, 1974. On the other hand, the same form used to show the effective date and the transfer of French to full-time status as a nursing assistant dated May 13, 1974, shows the box called full-time checked off and a vacation accrual date of May 13, 1974.

However, this would seem to be rather confusing, the General Counsel arguing that there is no difference between PRN and part time and Victory contending that there is a difference in that the part-time employees are regular part time whereas PRNs are only called as needed. There is insufficient testimony in the record to make a competent judgment with regard to whether there is a difference between these two classifications. However, because of my decision herein, as hereinabove related, I conclude that there is no particular impact on the case regardless of whether French was a PRN, a part-time employee, or whether in fact there is a difference between status of either of these two categories.

The balance of the testimony with regard to the reasons for French's not receiving work are basically set forth above and they include the Respondent's inability to contact French for scheduled work; the giving of false information on September 22 to Hamilton to the affect that he had not received the letter

of September 16, hereinabove discussed, interfering with the work of other employees and overstaying of the break with the facts which are hereinbefore set forth; the incident of October 10, 1974, with regard to appearing in the sterile area in street clothes and, also, the taking of the notice of the no-solicitation rule from the bulletin board and away from the Respondent's premises.

There was one further incident with regard to French and his conduct in the Hospital which had not been heretofore set forth.[11] French testified that on approximately January 30, 1975, he arrived at the Hospital to pick up his paycheck for work he had performed. When he arrived at approximately 6 p.m., he stopped in the cafeteria. There he saw another employee with whom he was acquainted. As he began to sit down to talk to the other employee, he was approached by assistant vice president of Respondent, Joe Hampton, who told French, "French, you know what I told you the last time you were here." French replied that he did. French admitted in his testimony that he had had a previous altercation with Hampton on December 26, 1974. Hampton then asked French to leave the cafeteria. French replied by asking if the cafeteria was not open to the public to which Hampton replied "Not for you it isn't French."

Upon this remark from Hampton, French stated that he would not leave the cafeteria and proceeded

[11] The complaint allegation with regard to this incident was made as an amendment to the complaint at the opening of the hearing herein by the General Counsel.

to sit down with the other employee. Soon thereafter two security guards approached French and asked him to leave. When he refused, they escorted him to get his paycheck and then out of the building.[12]

C. *Defenses, Contentions, Discussions & Conclusions*

1. The No-Solicitation Rule

Counsel for General Counsel contends that the no-solicitation clause, as written, is invalid on its face. He takes no issue with the prohibition written into the no-solicitation rule with regard to the prohibition of solicitation during working time in work areas which are not accessible to or utilized by the public, or the prohibition against distribution of any kind in any working area at any time. However, he does take issue with that portion of the rule which prohibits solicitation of any kind at any time in any area accessible to, or utilized by, the public. I would agree that on its face the rule in this respect is invalid. The Board and the Courts have long held that rules which prohibit solicitation during nonworking time and in nonworking areas are unlawful unless it is shown that "special circumstances" make the prohibitory rule necessary to maintain production or discipline.[13]

[12] From uncontroverted, credited testimony of French. Hampton was not called by Respondent to testify.

[13] *Walton Manufacturing Company*, 126 NLRB 697 enfd. 289 F.2d 177 (C.A. 5); *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615; *American Coach Company*, 158 NLRB 415.

However, Respondent contends that there are "special circumstances" presented here which must be taken into consideration in order to decide whether the foregoing rule is valid or unlawful. Otherwise put, the Respondent contends that in the case of nonprofit health care institutions a different rule should apply because (a) The only business of the Respondent is health care and the solicitation for union membership or the distribution of union literature within certain nonworking areas of such institutions, even on nonworking time, could have the tendency to interfere with such patient care and, (b) in amending the Act in 1974,[14] the Congress intended to treat nonprofit hospitals differently than other health care institutions and other businesses of all types. The Respondent's defense with regard to "special circumstances" shall be discussed first.

The respondent has had for a number of years, an employee handbook entitled "Inside Baptist Hospital." This handbook was revised on August 1, 1973, before the revision of the Act, as above set forth. In this revised addition is contained a set of principals by which the Respondent expects its employees to comply. Each employee is supplied with a copy of this handbook and, in fact, there is a tear-out sheet in the handbook which the employee must sign as a receipt for delivery to such employee of the handbook.

The various policies set forth in the handbook contain much emphasis upon patient care. Thus, the

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[14] Public Law 93-360, 93rd Congress, S-3203, July 26, 1974.

handbook states that the Respondent exists solely to provide superior medical care to patients and that the goal is "to treat all patients with sympathy, kindness and understanding, realizing that sickness and hospitalization may be a new and trying experience." The handbook in other places has other cautionary and policy language with which employees are required to comply. Some of these read as follows:

> "Even casual conversation with other employees may be overheard . . . be particularly careful about your conversation in elevators, eating places, and other places of public assembly within the hospital."
>
> "You are urged, therefore, to refrain from loud talking and laughing, gossiping, needless complaining and *any other activity* that would be disturbing to the patient or out of place in a hospital."

On another page the handbook states:

> "Noise deters patient treatment and recovery. It is each employee's obligation to avoid unnecessary noise in the hospital. Speak in a quiet, pleasant tone . . . employees should be alert for sources of unnecessary noise and to report these promptly to their supervisor."

In other portions of the handbook the Respondent cautions that the proper handling of difficult persons is important in order not to disturb the patients and that employees are asked to remember that visitors to the Hospital are frequently upset and unfamiliar with Hospital regulations.

The handbook also contains the original no-solicitation rule which is quoted hereinabove to the effect that solicitation is strictly prohibited anywhere in the Hospital without the approval of the Hospital administration and that violation of such policy would subject employees to disciplinary action.

Victory testified that even before learning of the revision to the Act or the Union organizing campaign, the Respondent retained counsel to review its personnel policies and procedures. Respondent's counsel, accordingly, reviewed, among other things, the employee handbook and the no-solicitation rule that was contained therein. Counsel advised Respondent to further clarify, in writing, the foregoing no-solicitation rule and to post the clarification on the Respondent's premises. Admittedly, the change in the Act came at approximately the same time that the Union's organizing drive began. It was during this period of time, from the time in August that the revision of the Act became effective, and the organizational drive began, and October 4, 1974, when the new rule or clarification of the old rule was posted, that the Respondent's counsel was engaged in the study of the personnel policies and, in particular, of the no-solicitation rule. As a result of the study, the revised, rule was posted on October 4. This is the rule which was taken by French on October 10. The rule is heretofore set forth in full. The portion of the rule with which the General Counsel takes issue is repeated here as follows:

> "No solicitation of any kind, including solicitations for membership or subscriptions, will be permitted by employees at any time, including work time and nonwork time, in any area of the hospital which is accessible to or utilized by the public."

This is the portion which Respondent contends should be judged lawful as well as the other portions because of "special circumstances" revolving from patient care as set forth in Respondent's handbook.

To sustain its contention that special circumstances exist, the Respondent offered the testimony of three witnesses, the first of whom was Victory. He testified that the revision of the rule was merely to clarify and that it was the same rule which had been in existence for many years as set forth in Respondent's handbook and, moreover, the existence of which every employee was apprised. Additionally, both employees White and French admitted in testifying that they were aware of the rule as long as they had worked for the Respondent and that the forbidding of solicitation of any kind in any area of the Hospital had been the rule long before the advent of the Union.

Called as expert witnesses were two physicians, both of whom performed surgery work at the Hospital. The first of these witnesses was Dr. Russel T. Birmingham, former profession of obstetrics and gynecology, many of whose patients were admitted to the Respondent's hospital for surgical and gynecological care. The second expert witness was Dr. Greer Ricketson, a plastic surgeon and, at the time

he testified, a clinical professor of plastic surgery at Vanderbilt University Medical School. He, like Dr. Birmingham, had many patients at the Respondent's hospital. Both of these physicians testified generally to the necessity for keeping patients calm and also for keeping patients' families as calm as possible. This was because of the psychological factor involved in the recovery process. They also testified that even an upset in pre-surgery, where a patient may not necessarily be bedridden and could even be ambulatory and have free access to the various portions of the Hospital, could have a marked effect on the success of surgery and also on a patient's recovery after such surgery, since a patient's well-being mentally and psychologically is a necessary factor in quick and complete recovery from the traumatic experience which most people must undergo upon entering a hospital or upon being submitted to surgery. They also testified that the patient and the patient's family are under great psychological stress, and that an upset to the patient's family could affect the patient in such a way as to adversely affect the patient's recovery. They were each then asked the hypothetical question with regard to whether a discussion concerning a union could affect a patient in a deleterious manner. Their answers were to the effect that if the discussion were to become volatile or hostile in any form, the discussion could definitely have the potential for adversely affecting the patient and the patient's family.

I do not believe that there is anything new or unusual in what the two doctors have testified. I believe

that even a layman would have the ability to realize that things could occur in a hospital because of arguments or any volatile conduct which could upset a patient's well-being.

Victory also testified to the effect that patients, especially those that are ambulatory and have small children who cannot visit the patient in his room, frequently visit the public places of the hospital such as the hallways, the gift shops and the cafeteria which is open to both the public, patients, and hospital personnel. Thus, the Respondent argues from all of the foregoing that union solicitations or distribution of union literature in any of the public places in the hospital could possibly affect the well-being of patients in the hospital and could delay the recovery of such patients. These then, according to the Respondent, are the "special circumstances" which it is necessary to consider in assessing the validity or unlawfulness of the rule as it was expanded, or as Respondent claims, clarified.

Careful consideration of all of the foregoing and a complete study of the testimony of Victory and the two physicians who testified as expert witnesses, convinces me that there is no difference between patient care in a nonprofit hospital or in a hospital which is proprietary and run for profit. The 1974 revision to the Act, which gave the Board jurisdiction over nonprofit hospitals, also set forth revisions to various portions of the Act to prevent strikes and other activities on the part of unions and union members except under certain conditions. However, neither the

Act revisions or the Legislative History thereof indicate that the Board should treat differently with employees involved in patient care in nonprofit hospitals as compared with proprietary hospitals. In other words, there is nothing in the revision, as I view such revision, or the Legislative History of such revision, to indicate that the Board should treat proprietary and nonprofit hospitals differently insofar as its assessment of no-solicitation rules are concerned. Therefore, it is necessary to review the Board's precedents concerning no-solicitation rules as the Board has found them in cases involving proprietary hospitals, nursing homes or other patient care institutions which are not classified as nonprofit institutions.

There is no doubt that patient care is the primary concern of any hospital including the Respondent's. Nor is there any doubt, as testified to by the medical experts called by the Respondent, that psychological impact can be either helpful or traumatic depending upon the circumstances in which the patient is placed. If the patient is placed in a tranquil situation his chances of recovery are far greater than if the patient is placed in a situation of turmoil. Moreover, as testified by Dr. Ricketson, a patient whose recovery is either delayed or interfered with by the activities of employees of the Hospital could possibly sue the hospital for malpractice, in which event, the cost of medical attention and nursing care in the Hospital would be affected. Nor is there any doubt as to the sincerity of the testimony of the two physicians who testified that the rule in question is necessary for

proper patient care and that the attitude of the patient and of his family have a marked effect upon the recovery of the patient. The question presented by this testimony is whether it is of such weight that the right of the employees to solicit in nonworking public areas of the hospital on nonworking time should be prohibited.

Counsel for the General Counsel contends, and the complaint alleges, that the adoption of the revised no-solicitation, no-distribution rule and the timing of such adoption was in response to the union campaign and was promulgated for the purpose of interfering with the campaign by interfering with the employees rights to organize. The only testimony in the record with regard to the basis for the adoption and promulgation of the revised rule was that of Vice President Victory.

Upon direct examination, as an officer of the Respondent, by Counsel for the General Counsel, Victory testified that he became aware of the union campaign in mid-August 1974. Victory further admitted, on direct examination by Counsel for the General Counsel, that the revised rule was revised and promulgated because of this campaign. Although Victory maintained that the policy really has not changed and that the same, basic no-solicitation policy had been in effect for years, he did admit that the revision was a direct result of the union organizational campaign and that this campaign was what prompted the change. On cross-examination by the Respondent's own counsel, Victory testified that sev-

eral months before the date of the adoption by Congress of the amendment to the Act bringing nonprofit hospitals under the coverage of the Act, Respondent had requested it's attorney to review all of the Respondent's personnel policies. As a result of this review, Respondent's counsel advised the Respondent that the rule should be clarified and this advice resulted in the promulgation and posting of the revised rule on October 4, 1974. Further, although Victory maintained that the revised rule was merely a further explication of Respondent's existing policy on solicitation, he admitted that the former rule was aimed primarily at keeping outside salesmen from soliciting business in the Hospital. Moreover, he further admitted that the revised rule was addressed to employees.

Additionally, Victory admitted that no physicians were consulted with regard to whether there was a medical necessity for a revision in the rule prior to its adoption and promulgation. He further admitted that no physicians were ever contacted with regard to this rule until after the complaint in the instant proceeding had been issued. Although employees French and White both admitted, upon cross-examination, that in years past the Respondent had enforced its earlier no-solicitation rule against salesmen coming on to the premises and soliciting in the cafeteria which was open to the public, I conclude that this does not in any respect alter the purpose of the promulgation of the revised rule.

As noted above, there is a distinct conflict between Victory's direct testimony, given in response to questions put to him as an agent of Respondent by Counsel for the General Counsel, and his testimony on cross-examination by the Respondent's counsel. Because of this conflict, and upon my observation of Victory while he gave the foregoing testimony, I am convinced that Victory was not wholly straightforward in stating, on cross-examination, that the revision of the rule in question was adopted as a result of the 1974 amendment to the Act. I am likewise convinced that the revision was directed at employees specifically rather than at outside salesmen in order to prevent solicitation for the Union on Respondent's premises. In arriving at this conclusion, I have considered not only the conflicting testimony given by Victory but the very timing of the revision so soon after the advent of the Union and French's open participation therein.

The Board has held that a broad no-solicitation rule which prohibits union solicitation in all public areas of a nursing home may be lawful where extraordinary circumstances are shown,[15] and although the Board in one case[16] has held that a broad no-solicitation rule somewhat similar to the rule involved herein was valid under the circumstances of that case, the Board in that case noted that the rule in question had *not* been adopted in response to a

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[15] *Summit Nursing Home, Inc.*, 196 NLRB 769.

[16] *Guyan Valley Hospital, Inc.*, 198 NLRB No. 28.

union campaign. There is no conflict or contradiction between the decision in the *Guyan Valley* case or in the *Summit Nursing Home* case, heretofore cited, because of the *Summit Nursing Home* case the Respondent's rule was adopted *in response* to the union's campaign. Also, the Board noted in *Guyan Valley* that the rule involved in that case prohibited solicitation only in the hospital's working area, whereas in the case at bar the rule prohibits solicitation in any area accessible to, or utilized by, the public, whether a working area or not a working area.

Thus, there remains for consideration, the question of whether, in the light of these precedents, the alleged "unusual circumstances" here attempted to be shown by the Respondent are sufficient to warrant a departure from the general Board policy of finding violative no-solicitation rules which prohibit solicitation in nonworking areas on nonworking time. I cannot conclude, despite the testimony of Victory and the two eminent physicians, that there is warranted the adoption of a policy with regard to Respondent's Hospital which is so radically different from the policy adopted heretofore by the Board with regard to other health care institutions. As stated by the Board in the case of *Summit Nursing Home, Inc.*,[17] "The rule was promulgated only after the Union began its organizational campaign. Nor does the record show that any unusual conduct by its employees or union organizers made the rule an overriding ne-

[17] 196 NLRB 769, 770.

cessity. We find that the rule was adopted, not because of, but in anticipation of, possible adverse conduct, and the record is lacking in any evidence that the work of its employees was impeded or in any major aspect affected by the advent of the Union."

It is noted that the testimony of the physicians in the instant case was directed to *possible* effects of union campaigns and was given pursuant to certain hypothetical questions. These questions involved what might be considered the *possible* consequences of *possible* violent reactions of employees to union solicitations or the distribution of union literature. However, there is no evidence in the record of sufficient substance to show that the conduct of the Union or any of the Respondents employees was of such nature as to make the rule an overriding necessity. Moreover, there are other sections of the Respondent's "Employee Handbook," which would, or could, be utilized by the Respondent to discipline an employee engaged in union solicitation who does not otherwise conform to the rules of employee conduct.[18] Thus, there exist, witnout the necessity to prohibit all union solicitation anywhere on the Respondent's premises on nonwork time, rules which prohibit unruly conduct by any employee, including one engaging in otherwise lawful union solicitation. Additionally, even newspaper articles or television or radio broadcasts available to patients could possibly be more upsetting to a patient's psychological well being than

[18] See e.g., Employees Handbook, Aug. 1, 1973 revision, PP. 15 *et seq.*, "Employee Conduct" and "Noise."

the observation by a patient of quiet and mannerly union solicitation of one employee by another. Yet, it is highly improbable that the Respondent would care to eliminate these means of communication from the world outside the Hospital.

Accordingly, I find and conclude that the current no-solicitation, no-distribution rule is overly broad, interferes with employees Section 7 rights and that its promulgation and maintenance are violative of Section 8(a)(1) of the Act.

2. The Reprimand of September 26

Counsel for the General Counsel contends that the Respondent issued the reprimand of September 26, 1974, to French because the latter engaged in protected union activity by soliciting on behalf of the Union in the Respondent's cafeteria and distributing union literature at the entrance to the Respondent's Hospital. The Respondent, on the other hand, defends against this contention arguing that French violated two of its rules of employee behavior in that he overstayed his leave time on the night of September 22 when he solicited union membership of employees White and Johnson in the Respondent's cafeteria and secondly engaged in solicitation of White and Johnson while the latter two individuals were actually on duty and not on nonworking time.

As heretofore set forth, the testimony of Victory, Underwood and Hamilton with regard to the reasons and the background for the issuance of the September 26 reprimand is somewhat confusing and in some re-

spects conflicting. To restate that testimony would unnecessarily lengthen and burden this decision. However, it is necessary at this point to summarize, to a certain extent, the said testimony. In sum, Vice-President Victory testified that before September 22, he had received no complaints with regard to French's overstaying breaks. However, on cross-examination Victory testified to the contrary, stating, in response to leading questions, that he had received numerous reports that French had been overstaying his breaks. Victory also, in his testimony, stated that he had known at that time that French was passing out union literature at the gate of the Hospital and that, accordingly, he instructed Food Supervisor Underwood to check the times that French spent in the hospital cafeteria. He stated that he had so directed Underwood on September 20, 1974, 2 days before French actually had been involved in the union solicitation of White and Johnson on September 22. Additionally, Victory testified that after Underwood had reported to him that French had overstayed his leave, he decided to have French reprimanded and, furthermore, the employees to whom French was speaking, namely White and Johnson, were verbally reprimanded.

Hamilton testified that French was timed on the night of September 22 because all supervisors were advised to do so on September 16 to make certain that no employees were overstaying their breaks. However, as is noted, Victory testified that only French's stay in the cafeteria was to be observed. Further-

more, Hamilton admitted that she had no knowledge of the fact that only French was to be timed with regard to his breaks and further testified that if Victory had given such instructions they would have come through her because she, as assistant director of nursing, would have been the one to order that French be timed during his stays in the cafeteria.

Underwood, who actually timed French's break stay in the cafeteria on the night of September 22, stated that she did so because of orders she had received from her supervisor either in June or July of 1974, several months before Victory, himself, testified that he gave the orders for such timing. Underwood, like Hamilton, stated that the instructions were that all personnel were to be timed. In her testimony Underwood did not relate that she received specific orders from Victory to single out French for time study. Underwood further testified that she had never noticed French in the cafeteria before the night of September 22 and the reason that she noticed him on that night was because he was soliciting and passing out literature. She further stated that she knew how long French had stayed in the cafeteria because she just "happened to look at the clock" as French entered. Additionally, Underwood testified that she also timed French on his dinner stay that night and he had only stayed the proper 45 minutes. However, only moments before this testimony was given she testified, as set forth above, that the only reason she noticed French was that he was passing out union literature which he had not done at the earlier time.

There are similar portions of Underwood's testimony which cannot be reconciled with other portions of her testimony.

Also, as noted above, it was on September 26 that French openly was passing out union literature at the Hospital entrance before he entered the building on that day to receive his paycheck. It was then that he was told he had to report to Hamilton before he would receive his check. When he did so he received the reprimand set forth earlier in this decision. Additionally, French testified, credibly, that at the time he received the reprimand it was dated September 26, but the copy that was introduced in evidence at the hearing was dated September 22. Moreover, French further testified, without contradiction by Hamilton who testified after French, that when he was told he would not have to work on September 27 and 29 as he had originally been scheduled, Hamilton told him "the Hospital didn't need employees like me who violated their rules." Hamilton, in testifying, merely denied that she had discharged or terminated French.

In view of the foregoing testimony, and in view of the fact that not only did the testimony of the three Respondent witnesses, Victory, Hamilton and Underwood conflict, but in the case of each individual who testified, that individual's testimony conflicted with other parts of the same individual's testimony. Accordingly, I am unable to credit the reasons assigned by the three for the written reprimand given to French.

Therefore I conclude that the actual reason for French's receiving the reprimand on September 26, was French's union activity which culminated on that day in the passing out of union literature at the entrance to the Hospital. I find the reasons assigned in the written reprimand to be pretextual and conclude that the reprimand was given in order to discourage not only French, but also other employees, from engaging in the activity of soliciting fellow employees to join and support the Union. In arriving at this conclusion I have considered, in addition to the above, the timing of the reprimand, and Hamilton's statement to French to the effect that the Hospital did not need employees who violated the rules. I have not overlooked the fact that French did actually overstay his grace period. French admitted this overstay in his testimony. However, in view of all of the circumstances surrounding the giving of the reprimand, and in view of the fact that Victory testified that the employees to whom French spoke on the night of September 22 were verbally reprimanded, and in view of the fact that employee White testified credibly that she had never been spoken to in any manner with regard to her conversation with French on that night, I find and conclude that the mere overstaying of his break by several minutes was not the true reason for the giving of the reprimand to French. Furthermore, it should be noted that when French spoke to these employees, although they were still on actual worktime, and not on breaktime, they were not actively on duty and were sitting at a table in the cafeteria smoking and chatting and, obviously, not at work. It was only after French commenced speaking to them, that Underwood ordered these employees to take trays to patients.

Accordingly, by reason of all of the foregoing I find that the reprimand of French dated September 22, but actually given to French on September 26, was made for the purpose of discouraging the union activity of French, and others, and was, accordingly, violative of Section 8(a)(3) and (1) of the Act.

3. The Respondent's failure to assign work to French

The question presented is whether the failure of Respondent to assign French, upon French's October 10 application, to a full-time nursing assistant position was the result of calculated discrimination or, as Respondent contends, was the result of a lack of need for such assistants brought about by diminishing turnover of employees, possibly by reason of the recession, together with a plethora of qualified applicants for whatever openings Respondent had. Also, Respondent presented testimony to the effect that French desired work only on the 3 to 11 p.m. shift and, moreover, had engaged in less than honorable conduct and had violated Respondent's employee behavior rules. If the foregoing did constitute the sole reasons for Respondent's failure to grant French's application for full-time employment, then it follows that the refusal to grant French's application was not violative.

However, the principal witness presented by the Respondent to support its contention that work as a

full-time nursing assistant was denied French for good cause was, again, Vice-President Victory. I have heretofore disposed of Victory's testimonial accusations against French with regard to the removal of the newly posted revised no-solicitation rule from the Respondent's bulletin board. I have credited French's testimony to the effect that another employee actually removed the document and handed it to French. However, French's participation in this particular episode does substantiate the fact that French did engage in conduct which was less than completely proper. Although on the day in question French did enter the surgery area on the fourth floor of the Hospital where Victory testified employees were not permitted to enter unless properly clothed in surgical attire, as noted above, French credibly testified that he was accompanied to the fourth floor, through the surgery area, by Lightford, French's immediate superior, and Lightford did not deny French entry into the area nor did he later on reprimand French for doing so. Lightford did not in any way controvert French's testimony in this respect.

With regard to other matters, Victory testified that the turnover of employees during the period involved herein was very small, that there were many qualified applicants for the positions open and, generally, French was not an ideal employee in that he violated Respondent's rules. However, I have in other instances refused to credit Victory's testimony and I cannot in this instance, therefor, credit Victory's testimony to the effect that there were many qualified

applicants for a very few jobs because of the fact that the employee turnover was so small. Victory's testimony in this regard is unsupported by any records offered in evidence by the Respondent or by any other testimony. Therefore, I do not credit Victory's unsupported testimony with regard to these reasons why French was not assigned the requested work.

Victory further testified to the effect that French desired only to work on the 3 to 11 p.m. shift and that there were no openings on that shift for French. However, the Respondent's own statistical records show that French's application for full-time work was for any shift. It was approximately one month later that French informed Victory that he would prefer the 3 to 11 p.m. shift, but did not withdraw his application for assignment to other shifts. This was explained credibly by French in that he could arrange his work at the Vanderbilt University laboratory in such a manner as to accommodate for any shift that Respondent saw fit to assign him. Additionally, from the date that French made application for full-time status until he informed Victory that he would prefer to work the 3 to 11 p.m. shift, five new nursing assistants were hired as full-time assistants, two of them on the second shift. Moreover, from the time that French made his application for full-time nursing assistant's work on October 10 up to the date of the hearing herein, Respondent's records reveal that a total of 12 full-time nursing assistants were hired and that after the middle of November 1974, when French expressed his preference for the second,

or 3 to 11, shift, a full-time nursing assistant was hired for that shift. Moreover, Victory's unsupported testimony that there were many applicants highly qualified for the few job openings, does not support a finding that those individuals who were hired after French made his application for full-time work were more qualified to perform the work than was French.

There is little in the record to support a conclusion that Respondent found fault with French's performance to any extent before his open activity on behalf of the Union. And even after that date, there was no testimony in the record to show that any actual work performed by French in attending patients was not fully satisfactory. Accordingly, I find that none of the foregoing reasons assigned by Victory with regard to the qualifications for work as full-time nursing assistants or the number of positions that were open, is dispositive of the issue of whether French was not hired as a full-time employee because of discriminatory reasons.

By reason of the foregoing, what is left to be explored is the Respondent's allegations that French consistently violated the Respondent's employee rules. However, the one rule which French seemed to consistently disregard was the no-solicitation rule which has heretofore been found to have been violative. Accordingly, if the Respondent has relied on French's ignoring of that rule, then Respondent's defense in this respect must fall since it cannot rely upon the violation of an unlawful rule as the reason for not hiring French or any other employee.

I have further discredited Hamilton's testimony to the effect that French lied about the receipt of notification of cancellation of his work assignment for September 20 and 22. Accordingly, I find that there is no credible record support for the Respondent's contention that French has lied.

From all of the foregoing I conclude that while French might not have been in all respects an ideal employee, as witnessed by his participation in the removal of the posting of the revised no-solicitation rule from the bulletin board and, perhaps, by reason of his failing to maintain his person as clean as possible, as testified by Hamilton, on the basis of all of the foregoing the failure of French to receive an assignment as a full-time nursing assistant in accordance with his application on October 10, 1974 was the result of Respondent's disenchantment with him for engaging in activities on behalf of the Union. Accordingly, I find and conclude that French's failure to receive work as a full-time employee on and after October 10, 1974 was by reason of these activities on behalf of the Union and was therefore discriminatory and violative of Section 8(a)(3) and (1) of the Act.

In view of the foregoing finding, I find it necessary to determine whether French's failure to receive more numerous work assignments as a PRN was caused by lack of available work or because French had engaged in union activity.

IV. The Incident of January 30, 1975

Hereinbefore related was the incident in which, on January 30, 1975, French entered the premises of the Respondent to pick up a paycheck and first proceeded to the cafeteria where he commenced a conversation with a fellow employee. At that time, the Respondent's assistant vice president Hampton approached French and asked the latter to leave. When French refused, Hampton called two security guards who then escorted French to the place where French received his paycheck and then escorted him out of the building. It should be noted, that at the time of the incident, French was not on duty.

General Counsel contends that the foregoing incident constituted a violation of Section 8(a)(1) in that it tended to interfere with French's Section 7 rights. On the other hand, the Respondent contends that it had every right to expell French from Respondent's premisse at the time. Respondent cites, in support of its contention, its handbook which provides in part that "Employees are not permitted to receive visitors while on hospital duty." Accordingly, the Respondent argues, when French went to visit with the other employee in the cafeteria he violated the Respondent's rule. Additionally, the Respondent cites the case of *GTE Lenkurt, Inc.*, 204 NLRB 921, in which the Board held that an employer may close his premises to its own employees during their nonworking time except for that which is characterized as "on duty nonworking time." The Board held that a rule of this nature is presumptively valid unless the

union can show that no alternative means of communication is available or that the rule was discriminatorily applied. The Board stated in that case that the status of an off duty employee who returns to vist an employer's facility "is more nearly analogous to that of a nonemployee, and he is subject to the principles applicable to nonemployees."

In the instant case there is a failure of proof on the part of the General Counsel to show that, in the first instance, French was engaged in any union or concerted protected activity at the time he went into the Hospital and visited his friend in the cafeteria. Secondly, it may be assumed that the rule which the Respondent cites was technically violated although there is no proof in the record on the Respondent's part to show that the employee to whom French was speaking was "on hospital duty." Thirdly, there is no showing by the General Counsel that French was subject to disparate treatment in this respect. There is no evidence that other employees were permitted in the Hospital when not on duty in order to visit with other employees.

In coming to the conclusion, above, taken into consideration are the findings heretofore related with regard to other violations committed by the Respondent. While this series of violations may be considered a precursor to the ejection of French from the cafeteria on Respondent's premises on January 30, and although it may further be considered that this action against French was merely a continuation of the pattern of behavior of the Respondent toward French, I nevertheless conclude that the General Counsel has

failed to prove by a preponderance of the evidence that the Respondent's action at that time was violative.[19] I find that the Respondent properly acted within lawful limitations in ejecting French. Accordingly, I shall order dismissed that portion of the complaint which alleges the Respondent's ejection of French to be violative.

V. The Effect of the Unfair Labor Practices Upon Commerce

The unfair labor practices of the Respondent as set forth in section III, above, occurring in connection with its operations set forth above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

The Remedy

Having found that Respondent has engaged in certain conduct prohibited by Section 8(a)(1) and (3) of the Act, I shall recommend that the Respondend be ordered to cease and desist therefrom and take specific affirmative action, as set forth below, designed to effectuate the policies of the Act.

[19] In arriving at this conclusion, I have considered the fact that Hampton did not testify to deny any of the content of French's testimony with regard to this incident. Nor have I disregarded, in considering all of the facts of this incident, the statement by Hampton, in response to French's question as to whether the cafeteria was open to everyone, to the effect that it was not open to French.

Having also found that Clyde Russell French has been denied work for discriminatory reasons, it shall be recommended that he immediately be offered work and be made whole for any loss of pay or other benefits sustained as the result of the Respondent's failure to assign work to him, computed as provided in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

On the basis of the foregoing findings of fact and upon the entire record I make the following:

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Local 150-T, Service Employers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. By promulgating and maintaining a no-solicitation rule which prohibits employees from soliciting for the Union during their nonwork time in nonwork public areas of the Hospital, the Respondent has violated Section 8(a)(1) of the Act.
4. By discriminatorily reprimanding employee Clyde Russell French on October 26, 1974, Respendent has violated Section 8(a)(3) and (1) of the Act.
5. By discriminatorily refusing work assignments to employee French, the Respondent has violated and is violating Section 8(a)(3) and (1) of the Act.

6. By ejecting French from its premises at a time when French was not on duty and not on any break or lunchtime, the Respondent has not violated Section 8(a)(1) of the Act as alleged.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10(b) of the act, I hereby issue the following recommended:[20]

ORDER

Respondent, Baptist Hospital, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Promulgating, maintaining in effect, enforcing, or applying any rule or regulation prohibiting its employees from soliciting on behalf of any labor organization during their nonworking time in any area of its Hospital which is a nonworking area including areas open to the public.

(b) Reprimanding or disciplining any of its employees in any manner for engaging in union or other protected cocerted activities.

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[20] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Discouraging membership in Local 150-T, Service Employee International Union, AFL-CIO, or any other labor organization, by denying any employee work because said employee engages in union or other protected concerted activity, or discriminating against any employees in any other manner in regard to their hire and tenure of employment or any term or condition of employment for like reason.

(d) In any other manner interfering with, restraining or coercing its employees in the exercise of their rights to form, join, or assist, or be represented by Local 150-T, Service Employees International Union, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing or to engage in other concerted activity for the purpose of collective bargaining, or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer immediate employment to Clyde Russell French as a full-time nursing assistant or a substantially equivalent position to that to which he would have been employed had he not been discriminated against, without prejudice to any seniority or other rights and privilege he might have acquired, dismissing if necessary any persons hired on or after October 10, 1974, and make French whole for any loss of earnings he may have suffered by reason of the discrimination against him in the manner set

forth in the section of this Decision entitled "The Remedy."

(b) Forthwith rescind its rule promulgated about October 4, 1974, to the extent that it prohibits its employees from soliciting on behalf of a labor organization during their nonworking time in any nonworking area of the Hospital including those areas open to the public.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Hospital copies of the attached notice marked "Appendix."[21] Copies of said notice on forms provided by the Regional Director for Region 26, of the National Labor Relations Board, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by Respondent for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken

[21] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

It is further ordered that the complaint herein be dismissed insofar as it alleges violations of the Act not found.

Dated at Washington, D.C.

/s/ Morton D. Friedman
MORTON D. FRIEDMAN
Administrative Law Judge

FORM NLRB-4727 JD-468-75

(9-69)

[SEAL] NOTICE TO EMPLOYEES [SEAL]
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT promulgate, maintain in effect, enforce or apply any rule or regulation prohibiting you from soliciting on behalf of any labor organization during your nonworking time in any nonworking area of the Hospital including those areas open to the public.

WE HEREBY rescind the rule promulgated October 4, 1974, to the extent that it prohibits you from soliciting on behalf of a labor organization during your nonworking time in any nonworking area of the Hospital, including those areas open to the public.

WE WILL NOT issue reprimands or otherwise discipline you for engaging in union or protected concerted activities.

WE WILL NOT refuse employment to any of our employees because they engage in union or protected concerted activities.

WE WILL offer Clyde Russell French immediate employment as a full-time nurses assistant, or a substantially equivalent position at which position he would have ben employed had he not been discriminated against, without prejudice to his seniority or other rights and privileges he might have acquired,

dismissing, if necessary, any persons hired on or after October 10, 1974.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of your right to form, join, or assist or be represented by LOCAL 150-T, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, or any other labor organization, to bargain collectively through representatives of your own choosing, or engage in other concerted or protected activity for the purpose of collective bargaining or any other mutual aid or protection or to refrain from any or all such activities.

All our employees are free to become or remain or refrain from becoming or remaining members of LOCAL 150-T, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, or any other labor organization.

BAPTIST HOSPITAL, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office,

Clifford Davis Federal Building, Room 746, 167 North Main Street, Memphis, Tennessee 38103, (Tel. No. 901—534-3161).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 270375 85

Supreme Court, U. S.
FILED
FEB 26 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-223

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—*v.*—

BAPTIST HOSPITAL, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 8, 1978
CERTIORARI GRANTED JANUARY 8, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-223

NATIONAL LABOR RELATIONS BOARD,
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—*v.*—

BAPTIST HOSPITAL, INC.,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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9.26.75 Respondent's Exceptions to the Administrative Law Judge's Decision received

10.10.75 General Counsel's Cross-Exceptions to the Administrative Law Judge's Decision received

10.10.75 General Counsel's Response to Exceptions of Respondent dated

3.26.76 Decision and Order of the National Labor Relations Board dated

6.6.76 Application for Enforcement filed

6.17.76 Answer to application received

5.10.78 Opinion and judgment of U.S. Court of Appeals for the Sixth Circuit issued

8.8.78 Petition for Writ of Certiorari filed in U.S. Supreme Court

1.25.79 Order granting certiorari issued

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Twenty-Sixth Region

Case Nos.
26-CA-5331-1
26-CA-5331-2

In the Matter of:

BAPTIST HOSPITAL, INC., RESPONDENT

—and—

LOCAL 150-T, SERVICE EMPLOYEES

INTERNATIONAL UNION, AFL-CIO, PETITIONER

A702 Federal Building
U.S. Courthouse
Nashville, Tennessee
April 1, 1975

The above-entitled matter came on for hearing, pursuant to Notice, at 9:30 a.m.

BEFORE:

Honorable MORTON D. FRIEDMAN, Administrative Law Judge.

APPEARANCES:

WILLIAM H. BROWN, JR., ESQ.

746 Clifford Davis Federal Building, 167 North Main Street, Memphis, Tennessee, appearing as Counsel for the Petitioner

JOE H. CLARK, ESQ.,

Elarbee and Clark, 750 Coastal States Building, 2600 Peachtree Street, N.W., Atlanta, Georgia 30303, appearing as Counsel for the Respondent.

* * * *

[13] W. T. VICTORY

was called as a witness by and on behalf of the General [14] Counsel and, having been first duly sworn was examined and testified as follows:

JUDGE FRIEDMAN: Give your full name and address to the court reporter.

THE WITNESS: W. T. Victory, Jr., 101 Bailey Collins, Smyrna, Tennessee.

DIRECT EXAMINATION

Q. (By Mr. Brown) Mr. Victory, are you employed?
A. Yes.
Q. Who do you work for?
A. Baptist Hospital, Inc.
Q. How long have you worked for Baptist Hospital?
A. About six and a half years.
Q. What job do you hold with the hospital?
A. Vice-President of personnel services.
Q. How long have you held that job?
A. Approximately three years.
Q. What position did you hold prior to that?
A. I was personnel director.
Q. What's the difference in those two positions?
A. Very little.
Q. What are your responsibilities as vice-president of personnel?
A. I am responsible for all the personnel functions of the Baptist Hospital, wages and policies.

* * * *

[15] Q. Are you familiar with a labor union by the name of Service Employees International Union?
A. Yes, sir.
Q. Are you aware of the fact that they had some organizational activity going on out at the hospital?
A. Yes, sir.

Q. How long has the hospital been aware of that, or how long have you been aware of that?

A. Oh, since sometime, I believe, in August of '74.

Q. 1974?

A. Yes.

Q. Do you know what part of August; can you pin it down any closer than that?

[16] A. Middle part.

Q. How did you first learn about this?

A. The union representatives were handing out handbills.

* * * *

Q. (By Mr. Brown) Were you personally, as personnel head, concerned about the fact there was organizational activity going on?

A. Yes, sir.

Q. I presume you also became aware of the fact that the hospital came under the coverage of National Labor Relations Act in August of 1974?

A. Yes, sir.

Q. What type of no solicitation rule or solicitation rule, if you will, does the hospital presently have?

MR. CLARK: I don't want to interrupt, but we have this in the complaint, and we admitted to it.

JUDGE FRIEDMAN: Yes, I think we can stipulate to that.

[17] MR. BROWN: I would like to have this identified and introduced into evidence for simplicity of questioning the witness, although it's in the complaint.

JUDGE FRIEDMAN: I will permit that.

(The document above-referred to was marked General Counsel's Exhibit Number 11 for identification.)

Q. (By Mr. Brown) I hand you a document marked for identification, General Counsel's Exhibit 11 and ask if you can identify that?

A. (Witness nods head affirmatively.)

Q. What is that?

A. In essence our solicitation-distribution policy at Baptist Hospital.

Q. When did that go into effect?

A. Well, it's dated October 4th, and this is when it was posted and written.

JUDGE FRIEDMAN: That was in '74?

THE WITNESS: Yes.

MR. BROWN: We would move to have that introduced at this time.

MR. CLARK: No objection.

JUDGE FRIEDMAN: Received.

(The document, heretofore marked General Counsel's Exhibit Number 11 was received in evidence.)

[18] Q. (By Mr. Brown) Mr. Victory, with reference to documents introduced as General Counsel's Exhibit 11, did the union activity going on at the hospital have anything to do with the enactment of that rule?

A. Yes.

Q. Would you elaborate a little bit?

A. Well, until we got activity within the hospital, we first of all had never had too much of a problem with solicitation. We just did not permit it at all. There had been occasions when we had asked people to leave the hospital selling various products, not causing too much of a problem other than stopping our employees during the working hours and Avon or something like this would come in and when the union came in there, this began to stop our employees and discussions of union action, pros and cons, some for, some against, this was causing disruption in our work force.

Q. Where was that taking place?

A. Various places in the hospital.

Q. Was it or were you concerned about problems that the union might cause when that rule was enacted?

A. Yes.

Q. Would you elaborate on that a little bit for me?

A. Well, of course, our primary purpose for being is patient care, and we don't want anything to disrupt patient care. We have a name in the community of being one of the [19] best hospitals in the country. We want to maintain this. Our primary purpose is to provide a patient with the best in facilities, the best in care. We

felt like any disruption, regardless of who caused it, it's our responsibility to protect the patient at all times.

Q. Would it be a fair statement then to say that the no solicitation rule was a direct result of the campaign which the union began or was in the process of putting on at the hospital?

A. No, I don't think it would be, because we have a no solicitation policy, and have had for years.

Q. But, the change in the no solicitation rule?

A. Yes.

Q. Would that be a fair statement?

A. Yes.

Q. And it was a direct result of this union organizational campaign?

A. Yes.

Q. That's what prompted you to make this change?

A. Right.

Q. Now, I believe you stated just a second ago that prior to the posting of this rule on October 4, that the company had had a no solicitation rule in effect?

A. Right.

Q. This is the rule set out in the employee handbook; [20] is that correct?

A. That's correct.

MR. BROWN: Can we mark this for identification.

(The document above-referred to was marked General Counsel's Exhibit Number 12 for identification.)

MR. BROWN: Again, this rule is pled in the complaint, but I would like to introduce the booklet for the sake of questioning the witness and other purposes.

JUDGE FRIEDMAN: All right, is this the old rule or the new rule?

THE WITNESS: This is the old rule.

JUDGE FRIEDMAN: Any objection?

MR. CLARK: No objection.

JUDGE FRIEDMAN: Received.

(The document, heretofore marked General Counsel's Exhibit Number 12 was recived in evidence.)

Q. (By Mr. Brown) I hand you Exhibit 12, and can you tell me what that document is?

A. Employee handbook.

Q. When did this go into effect?

A. This one was revised in August of '73.

Q. Is the old no solicitation rule contained in that document?

A. Yes, sir.

[21] Q. What page is that on?

A. Page 17, first paragraph.

Q. Had there been any change, or do you know how long the particular rule that's in that book had been in effect; in other words, when that booklet was printed, was there any change from the one in existence prior to that?

A. I'm not sure, but I don't think there was.

MR. BROWN: I would like to have this marked as General Counsel's Exhibit 13.

(The document above-referred to was marked General Counsel's Exhibit 13 for identification.)

Q. (By Mr. Brown) I will hand you what's been marked for identification as General Counsel's Exhibit 13 and ask you to tell me what that is?

A. That's a handbook at Baptist Hospital.

Q. When did that go into effect?

A. August 1, 1970.

Q. Was that the handbook that was in effect immediately preceding the one you have that is Exhibit 12?

A. Yes, sir.

Q. Is there a no solicitation rule in that handbook?

A. Yes, sir.

* * * *

[22] Q. (By Mr. Brown) Now, with respect to the rule that was in existence prior to October 4, of '74, which I will refer to as the old rule, what type of solicitation did that rule prohibit?

A. Any form.

* * * *

[23] Q. (By Mr. Brown) Does the new handbook have certain rules and regulations pertaining to employee conduct?

A. Yes, sir.

Q. What is the formal procedure when an employee violates one of the rules contained in that handbook; what do you do?

A. He would usually receive a verbal reprimand followed by a written reprimand.

Q. What do you mean, he would receive a verbal reprimand followed by a written reprimand; does he get them both at the same time?

A. No, he would first receive a verbal reprimand. Any reoccurrence would result in a written warning.

* * * *

[25] Q. Under that new rule, which was put into effect on October 4th, where are employees allowed to solicit in the hospital?

A. We have nursing stations, utility rooms, maintenance building, laundry building, several areas.

Q. Is that all of them?

A. Dining areas.

Q. What type of dining areas?

A. We have an employees' dining area in the laundry building, we have an employees' dining area on the fourth floor on the surgery department, we have lounges.

Q. What about the hospital cafeteria?

A. Hospital cafeteria, yeah.

Q. Are they allowed to solicit or distribute literature in the hospital cafeteria?

A. No.

Q. What is the criteria that determines where an employee can solicit and can't solicit?

A. An employee can solicit at this time in any area we just outlined where patients and visitors are not allowed.

[26] Q. What about areas which are considered work areas?

A. Well, a nurses' station is considered a work area, and they would be allowed in a nursing station.

Q. How about distribution of literature; where can that take place?

A. In these areas I have outlined, but not in a work area as such.

Q. Well, now the areas you outlined, I think, were dining areas, lounges, utility rooms and nurses' aide stations. You say an employee can solicit in those areas?

A. Right.

Q. Can he or can he not distribute literature in those areas?

A. If they are not work areas, no.

JUDGE FRIEDMAN: I am sorry?

THE WITNESS: They cannot distribute materials in a work area.

JUDGE FRIEDMAN: These are considered work areas; are they not?

THE WITNESS: To some extent.

JUDGE FRIEDMAN: I mean the nurses' station would be a work area?

THE WITNESS: Right.

JUDGE FRIEDMAN: Thank you.

Q. (By Mr. Brown) What does—I see in the rule the [27] hospital has used the term of solicitation of any kind. What does that include; what are you talking about there when you say solicitation of any kind; what does that prohibit?

A. That would prohibit car salesmen, collection agencies, insurancemen, union organizers, anything that disrupts the work schedule of an employee.

Q. Now, would that include talking to people?

A. If it stopped them from their work, it would.

Q. Would it include distribution of, let's say, union cards?

A. Yes.

Q. So, when you say there is no solicitation in any area open to the public, what you really mean is that you can't talk to anyone about the union or about anything else not related to work, and you can't distribute any literature?

A. Not specifically union literature, but any kind of literature.

Q. That's in any area open to the public?
A. Open to the public and the patients.
Q. All right. Now, what about distribution. That's what I am confused about. In the rule it says that you cannot solicit in areas which are utilized or accessible to the public, and in the last paragraph, no distribution of any kind of circulars or other printed materials shall be permitted in any work area of any kind. I don't understand [28] that. Can you explain that to me; as I understood you a moment ago, you said solicitation would include talking with people about the union and distributing literature, things of that nature that would disrupt or stop that employee from doing something?
A. Maybe I can clarify that a little bit. We would not allow anyone to come up and just indiscriminately leave circulars or any type of material that would necessitate a health hazard or health hazards by leaving materials in the work stations or any part of the hospital, because this is one thing we are high on is the cleanliness of the hospital.
Q. Would you allow him to distribute literature, not leave it lying around, but distribute it?
A. No, sir, to the employees or the general public?
Q. Right?
A. Not if we found them, because when you start distributing, you have got to stop an employee to find out if he wants to read it and accept it or not.
Q. If I understand you correctly, in any area of the hospital where there is work going on or open to the public, anyone is prohibited from distributing or talking to the general public about the union?
A. Not only union but any other subject that could be considered solicitation.
Q. How does the hospital define what a work area is?
[29] A. I think a work area would be defined as any area that a patient might receive any service from.
Q. Does that mean treatment as far as health?
A. And convalescence.
Q. Other things?

A. I don't know what else you would have in a hospital.
Q. Okay. Well, let's take for instance you have a gift shop, don't you?
A. Right.
Q. Is that considered a work area?
A. For the employees who are employed in the gift shop, yes.
Q. What about for people who are coming in and out to get a pack of cigarettes or a magazine?
A. A magazine. No, it would not be a work area.
Q. Well, then it's open to the general public?
A. Right.
Q. Are patients normally found down in the gift shop?
A. They frequent the gift shop, patients do.
Q. Is solicitation or distribution allowed in the gift shop under this rule?
A. I'd say no.
Q. It is not?
A. No.
Q. But, it's not considered a work area other than [30] with respect to the person who might be behind the counter taking the money for the articles?
A. Right.
Q. All right, does the hospital have a—well, strike that.
You have already said the hospital has a cafeteria, right?
A. Right.
Q. Where is that located?
A. Located on the first floor of the main building, the central building.
Q. Could you describe that facility, what's the layout; how large is it?
A. I really don't know the dimensions on the cafeteria.
Q. Do you know how many people it will seat, a hundred, two hundred?
A. I would say a hundred and fifty.

Q. Is that open to the employees?
A. Yes.
Q. Is it open to the general public?
A. Yes.
Q. Is there any restriction on who can use that cafeteria?
A. No.
Q. Is that considered a work area?
[31] A. For the employees of the cafeteria.
Q. Where do they perform their work in there?
A. Serving lines, in the back in the preparation of the food, and we have no waitresses or waiters as such, so they would be from the serving line in the back.
Q. So, you have a serving line, just a conventional type cafeteria set up?
A. Right.
Q. And you have a kitchen behind that?
A. Right.
Q. And that's where the employees are performing the work?
A. Right.
Q. They are not out in the cafeteria performing the work?
A. Right.
Q. Is the cafeteria considered an area where the employees and general public eat and relax?
A. Right.
Q. Is solicitation prohibited there?
A. Yes, sir.
Q. Is distribution prohibited?
A. Yes.
Q. Why is that?
A. Primarily because we have not only employees, we have [32] already said it's open to the public, but we have patients, visitors of patients, patients' families also eating in the cafeteria with the employees, and we have found that any time we do anything that lets a patient or their family see that we have our mind on anything but patient care, this is very disruptive to the patient and sometimes affects the patient's ability to recover.

Q. Okay, and the distribution of union literature or let's say, the solicitation of employees to join the union in the cafeteria, in a portion of the cafeteria where there are no employees working, that would in no way affect the work going on behind the line or in the kitchen?
A. It would not affect the work going on behind the line, no.
Q. So, if I understand you correctly, what you are saying is the reason the hospital does it is you don't want the general public subjected to that type thing in the cafeteria?
A. And the patient.
Q. The patient doesn't receive any treatment in the cafeteria?
A. No.
Q. Normally when employees are in that cafeteria, they are on break or lunch period; is that right?
A. Right.
[33] Q. What about lobbies; does the hospital have any lobbies in it?
A. Yes, sir.
Q. Where are they located?
A. Twenty First Avenue side of the hospital and a very small lobby on the other side.
Q. What are those areas used for?
A. Access to the hospital and exit.
Q. That's where the visitors come in and out then?
A. Right.
Q. They often wait around in there before going up to see a patient?
A. Right.
Q. Are patients normally found in those areas?
A. Patients do go to those areas. If a patient is convalescing to the point he can get around, sometimes he will accompany his visitors back to, say, the lobby.
Q. But, he's not normally found down there, he's normally up in his room; is that correct?
A. Right.
Q. Is that area considered a work area, the lobby?
A. No.

Q. Is solicitation or distribution permitted in those areas?

A. By employees?

[34] Q. By anyone?

A. Solicitation by employees, I would say, no, we have a general no solicitation or distribution policy.

Q. Is that because it's open to the public or because it's a work area?

A. It's open to the public.

Q. Is the same true with the cafeteria because it's open to the public?

A. Right.

Q. And the gift shop?

A. Right.

Q. Are there any public restrooms in the hospital?

A. Yes.

Q. Where are they located?

A. I think you will find both male and female on approximately every floor, not every floor, but in the central building, yes, sir, on every floor except maybe the fourth floor which is the surgery area, but then in—over in the south and east building, they are a little bit more sparse.

Q. Do you have those down on the first floor of the building where the visitors come in and out?

A. Yes.

Q. Do patients normally use those restrooms?

A. No.

Q. So, that's primarily used by the general public?

[35] A. Right.

Q. It is not considered a work area?

A. No.

Q. But, solicitation and distribution again would be improper there because of public use?

A. Right.

Q. How are the entrances to the hospital laid out; how many entrances do you have, primary entrances?

A. Primary entrances?

Q. Yes?

A. Emergency room entrances, Twentieth Avenue entrance, Twenty First Avenue entrance, and those are really the primary entrances to the hospital.

Q. Is there any distinction with respect to those entrances as to who can use them, the public or employees or such?

A. No.

Q. So, the employees or the public can use any of those?

A. Yes.

Q. Do any of those entrances have what I would call a foyer or porch on them?

A. I think all of them do. Twentieth has a cover, the emergency room has a cover, and Twenty First has a cover.

Q. Except for the emergency room, would those foyer

[36] areas be considered work areas?

A. No.

Q. Again, solicitation would be prohibited because of the public use of them?

A. Yes.

Q. How about sidewalks on the hospital property?

A. That's the key, that's the hospital property and used by the public.

Q. Now, solicitation and distribution would be prohibited on those sidewalks?

A. (Witness nods head affirmatively.)

Q. Is there any work that takes place on those sidewalks?

A. No.

Q. Except for bringing into the emergency room?

A. Right.

Q. Do the hospitals have a parking lot?

A. Yes.

Q. Where is that parking lot located?

A. Twentieth Avenue across Twentieth Avenue from the hospital.

Q. Is that utilized by the general public?

A. Yes.

Q. It's also available to the employees; is it not?

A. Right.

Q. Is that considered a work area?

[37] A. No.

Q. Are distribution and solicitation allowed there?
A. No.
Q. Again, for the same reason, the public uses it?
A. Right.
Q. All right. I want to jump back just a second. You mentioned you had some areas that employees would be allowed to solicit in. For example, the dining area in the laundry room; where is that?
A. That's in the new laundry building. There is a dining area off of Patterson Entrance into the laundry building.
Q. Okay, would you take a look in the back of the employee handbook, and I believe there is a diagrem of the hospital there. Is that a correct diagram of the hospital as it exists now?
A. Right.
Q. Would you identify that laundry building; what number does it possess?
A. Number one.
Q. What's that building primarily used for?
A. That is the laundry.
Q. That's where you do the linens for the hospital and the uniforms?
A. Right.
Q. What is that dining room utilized for on the fourth [38] floor?
A. That's the dining area on the surgery floor, and it's a dining area and vending machines and coffee and this type thing, tables and chairs and ashtrays.
Q. You are talking about the one in the laundry building?
A. No, in the central building.
Q. I meant the dining area in the laundry building; what type facility is that?
A. As far as physical arrangement, it's very similar to the cafeteria. It has vending machines and soup machines and things like that.
Q. It doesn't have a cafeteria line?
A. No.
Q. How many employees will that hold over there?
A. I would say fifty.

Q. Is there any hot food served over there other than what might come out of a vending machine?
A. No.
Q. What employees normally use that facility?
A. Laundry facility employees and anyone else that wants to.
Q. Do you know whether the employees from the main building go over there or not; would they have occasion to?
A. To get the uniforms and this type of thing, they would [39] frequent the building.
Q. Do you know whether or not they frequent that dining area?
A. No, I do not.
Q. You mentioned an employee lounge on the fourth floor?
A. Yes, sir.
Q. What number does that have?
A. Number eight.
Q. Who is that open to?
A. Well, it's primarily for surgery, but it's open to anyone.
Q. How big a facility is that?
A. You mean how many employees—
Q. (Interposing.) Yes?
A. Twenty-five or thirty seating capacity.
Q. What type of facilities does it have?
A. Vending machines, tables and chairs.
Q. Again, it doesn't have any hot food other than what comes out of the vending machine?
A. Right.
Q. Utility rooms; where are they located?
A. There is one located at each nursing station, I think, throughout the hospital.
Q. All right, do you know how many of them there are throughout the hospital?
[40] A. I believe about twenty-eight of them.
Q. Okay. What is a utility room used for; what's the purpose of it?
A. Storage of materials and also they have an area that sometimes is used for coffee machines or a coffee pot or this type thing and where they can smoke.

Q. Is that considered a work area?
A. Yes and no. There is some work—they go in and get materials, but they also use this as a break area sometimes.
Q. So, it's both used when they take breaks and also to perform work when they are getting materials out of it?
A. Right.
Q. How about the nurses' aide stations; how many of them are there?
A. Nurses' stations.
Q. Excuse me.
A. About twenty-six of them, I believe.
Q. Where are they located?
A. You have two nurses' stations on each floor in the central building, and you don't have that in the older part, but you have a nurses' station usually on each floor.
Q. What are you talking about when you talk about the older part?
A. In the south building.
[41] Q. Would you identify those on the diagram?
A. Nine and ten.
Q. Are there any other buildings where you keep patients; you have mentioned the central building and the two you have just mentioned; is there any other?
A. Eleven.
Q. What is that?
A. That's the annex and the nurses' room.
Q. Are there nurses' stations in all four of those buildings?
A. Yes.
Q. What takes place in the nurses' stations?
A. That's where all the activity for a certain number of rooms is taken care of by the staff, such as the patient's charts, and this is where the doctors come and this is the hub for all the activity for patient care on that particular floor.
Q. So, there is work going on in that area?
A. Right.

Q. I don't remember whether I asked you or not, but is solicitation allowed in the nurses' station; that is a work area?
A. I don't think we would probably—if it was being carried on by employees, because the public does not come into those areas.
[42] Q. The public has access to it at the front; is the front glass?
A. Right.
Q. And the public does come up and inquire as to what room the patient is in?
A. Right.
Q. So, they do have limited access?
A. Yes, but very limited.
Q. What about the utility rooms?
A. Yes.
Q. Solicitation is allowed there?
A. Yes.
Q. What about distribution of literature?
A. Let me clarify what I think our position is on literature of any type. If it distracts from the overall appearance of the hospital, if it becomes a housekeeping problem, this is the type thing we are against, not just union literature, any type of literature or anything that distracts from the overall appearance of the hospital.
Q. I am asking you about union literature; are you allowed distribution of union material, in, let's say, the utility room?
A. I would allow it if it did not get back to the problem I have just eluded to.
Q. Has the problem come up yet?
[43] A. Yes, sir.
Q. Has this rule been made known to the employees?
A. It's been posted.
Q. It's been posted?
A. Yes.
Q. So, you left it up to them to interpret it?
A. Right.
Q. So you or none of your staff has gotten them together and explained what you meant by work area and so forth?

A. We have not had a meeting per se on just the solicitation.

Q. Are there not any patients on the first floor of any of your buildings?

A. No, sir.

* * * *

[70] JOHNNY R. ROBERTS

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

* * * *

DIRECT EXAMINATION

Q. (By Mr. Brown) Mr. Roberts, are you employed?

[71] A. Yes, sir, by Service Employees International Union, Local 150-T.

Q. In what capacity do you work for this labor organization?

A. I serve as business representative.

Q. How long have you worked for them?

A. Forty-nine months.

Q. Has the local conducted an organizational campaign out at Baptist Hospital?

A. Yes, sir.

Q. Do you know when that began?

A. The first part of August.

Q. Have you ever done any hand billing out at the hospital?

A. Yes, sir.

Q. Has any employee ever assisted you?

A. The only employee has been, that has assisted, has been Mr. French.

* * * *

[72] W. T. VICTORY

resumed the witness stand and testified further as follows:

CROSS EXAMINATION

Q. (By Mr. Clark) Mr. Victory, I believe you testified on direct examination that you became aware of the fact that Mr. French was supporting the union because you had observed him personally passing out literature on the sidewalk; is that correct?

A. That's correct.

Q. I believe you also testified that you also knew that he was active for the union because you had received several reports from sources, including information that Mr. French was passing out literature in the cafeteria; is that correct?

A. That's correct.

Q. Did you discipline Mr. French for either of these [73] two incidents?

A. No, sir.

Q. Can you tell us why he was not disciplined?

A. Well, the distribution in these areas had not become a problem. There was not leaflets laying around, and it had not become a litter problem, for one thing.

Q. All right, I believe you also testified that on October 4, there was posted in the hospital some new language with respect to solicitations and distribution of literature; is that correct?

A. That's correct.

Q. Could you tell us whether or not the posting of this notice in any way changed the practice or the application of the rule as compared to prior to the posting of it?

A. It did not change it. The practice that we have been applying and the policy we had been applying had not changed from even before I went there, and has always been the same.

Q. Can you tell us approximately when you became aware of any change in the law which affected your hospital?

A. Of course, in several months before the law actully went into affect, if you will recall along the lines of the solicitation and distribution, we asked your firm to review all of our personnel policies, thinking the law

would be changed, and we wanted to be in compliance with the law, [74] and this is where our new wording came out. No new policy, no new procedure, but you wrote the solicitation policy after reviewing all of our personnel policies.

Q. All right, what did I advise you with respect to the rule, if anything?

A. I'm not—

Q. (Interposing.) Did I give you any advise on any legal opinion as to whether or not the practice you had been following would meet the requirements of the new law?

A. Yes, you advised me, you advised me that what we had been doing needed to be clarified to the employees, thus resulting in this posting of—even though we had been applying the policy all along, it was your advice that we clarify it and post it for all of our employees to understand the policy.

Q. Since you posted this rule and since the complaint has been issued, have I had any discussions with you concerning the possible settlement of this case involving a change in the rule; have we discussed the possibility of settling this case by changing the rule?

A. Yes.

Q. Did you in management conclude that the rule should be changed or left now as it is?

A. It was the conclusion of management that the rule be left as it is now.

[75] Q. What was this conclusion based upon?

A. It was felt by administration to weaken this rule or change it would not be in the best interest of our patients, due to the fact that here again we have patients, visitors in our hospital, and we certainly didn't want any type of commotion or argument or this type of thing to result from distribution or solicitation of any kind, and it was felt—here again, our primary purpose is that of patient care, and we didn't want anything to disrupt that.

* * * *

Q. (By Mr. Clark) My statement is, you base this conclusion on the fact that number one you and the

officials of the hospital were concerned about patient care?

A. Right.

Q. Was there any additional consideration insofar as [76] any liability or anything?

A. Of course, there is always a liability, of course, and our—to give you a good example, just recently we have gotten—most of us have read in the paper about the changes in liability costs, both hospitals and doctors, and we foresaw this.

Q. What kind of liability are you talking about?

A. Hospital liability insurance, the premiums for liability insurance. Those are increased—well, they have just about tripled.

Q. You are referring to malpractice claims against the hospital?

A. Right.

Q. And the general costs for the hospital was the primary concern in this factor. Have you conferred with any physicians concerning the possibility of changing this rule, and what impact it would have on any claims of medical malpractice?

A. Yes, we have.

Q. What does these physicians tell you?

* * * *

[77] THE WITNESS: The consensus of the doctors we talked with felt that here again the patient—and we have to think of the patient as their relationship between the doctor and the patient, the hospital and their visitors and their families, that anything that was in the hospital that would cause anxiety on the part of the patient would be detrimental as far as the patient's recovering fully, and the people we talked to and the doctors we talked to felt that to allow this type of activity in the hospital could be very detrimental to each patient that might be an area where this might be happening.

Q. (By Mr. Clark) Did or did not these physicians tell you in their professional medical opinion that to change this rule and the way NLRB had asked you to

change it would subject you to exposure to a malpractice claim?

A. Right.

Q. That's what they told you?

A. They certainly did.

* * * *

[81] Q. Has there been any change in the application of the rule since you became employed by the Baptist Hospital?

A. No.

Q. Are you applying the same rule now that you did the day you got there with respect to no solicitation and no distribution?

A. Right.

* * * *

[85] Q. How many years have you worked in a hospital?

A. About six and a half.

Q. And approximately how many employees do you have?

A. Oh, it fluctuates from eighteen to nineteen hundred employees.

Q. How many beds do you have?

A. Six hundred.

Q. What service does that hospital perform?

A. The normal hospital services of a general hospital, emergency room, acute, intensive.

Q. In your experience, Mr. Victory, as an employee of [86] the hospital, have you had an occasion to personally observe patients and their guests being under strain?

A. Yes, I have observed patients and guests being in a hallway and the chapel, and even in the cafeteria and showing emotion.

Q. Have you made any representation to employees at any time concerning the hospital's concern for the patient's state of mind or attitude?

A. We have some areas denoting that in the handbook. For instance, loud noises, loud talking, laughing at the nurses' station or around an area where a patient

might be, or anything that might be disturbing to the patient.

Q. Are your employees required to read this handbook?

A. Yes, sir.

Q. Are they required to sign it, saying they have read it?

A. Yes.

Q. Does compliance with this no solicitation and no distribution rule prevent employees from having union activity in the hospital, or only in certain areas?

A. It only prevents them from having activity in work areas.

Q. Insofar as the solicitation, I'm talking about where one employee solicits another employee to join the union, in what area is this permitted, and what areas is it not [87] permitted?

A. You want the specific areas?

Q. Yes. I'm an employee, let's say, in the hospital, and I'm active for the union. I want you to tell me what rights I have to go to other employees and try to convince them to join this union, what areas of the hospital can I do it in, and what areas can I not do it?

A. Nurses' station and lounges.

Q. Are these where I can or cannot?

A. Where you can. Some of the different buildings, maintenance building, laundry building, dining areas.

Q. And how many different nurses' stations do you have?

A. I believe we have twenty-six.

Q. About what size are these?

A. Approximately forty by twenty, something like that.

Q. Each one of these is about forty by twenty?

A. Uh-huh.

Q. Can you tell us whether or not they are glass-enclosed areas?

A. Yes, they are.

Q. Approximately how many utility rooms do you have?

A. Approximately the same amount, twenty-six or twenty-eight.

Q. Would employees be permitted to campaign and solicit [88] for the union in this area if they are not working?

A. Right, they would.

Q. Identify those areas in the hospital where employees take breaks, which are off-limits to patients and guests of patients where union activity could be performed?

A. The lounge areas, the nursing stations, and utility rooms.

Q. Are breaks taken there?

A. Yes.

Q. What facilities do you have in the employees' dining areas for people to take breaks?

A. You mean what's the physical layout?

Q. Yes?

A. Tables, chairs, ashtrays, vending machines.

Q. Can they get food there?

A. Yes.

Q. Can they get drinks there?

A. Yes.

Q. Do they actually do this?

A. Yes.

Q. These areas are off-limits to the public?

A. Right.

Q. You have made no effort at all to curb union activity in those areas?

A. No.

[89] Q. Do you know whether or not employees openly have solicited for the union in these areas that are not accessible to the public?

A. Yes.

Q. They have campaigned for the union in those areas?

A. Yes.

Q. Have you done anything to prevent that?

A. No.

Q. Let's talk just a minute about your main cafeteria. Your main cafeteria, from your testimony so far, is an area where you do have the public?

A. Right.

Q. What would occasion a patient to be down there in a public cafeteria?

A. Well, many times the patient may come in early for tests to be admitted, or they will go down as most hospitals have a rule children under a certain age are not admitted in the rooms with the patients, and the patients sometimes come down to the lobbies or cafeteria to see and meet their children, this type of thing.

Q. Have you made any study, at my request, to determine the percentage of nonemployees that use this main cafeteria?

A. Yes, I have.

Q. Would you reveal the facts on that study?

A. On a week day, about thirty-two percent of the people [90] eating in the cafeteria were visitors.

Q. You mean nonemployees?

A. Yes, nonemployees. On the weekend, approximately fifty-three percent of the people eating in the cafeteria were not employees.

* * * *

[92] Q. Now, you testified, Mr. Victory, that there are certain areas of the hospital that you won't let employees discuss the pros and cons of a union. Have you had that same policy in effect for management in their discussion concerning the pros and cons of the union?

A. Right.

Q. Would you elaborate on what I'm talking about?

A. We would not hold a meeting to discuss our side of the story with employees in an area we do not allow the employees—in other words, we wouldn't go into a patient's room or, you know, we wouldn't subject patients and visitors [93] to this type thing, just as we have said they can't do it either.

We certainly haven't violated a policy by going and holding meetings for the company, so to speak, in these same areas.

Q. In other words, you have not had a double standard, you have applied the same standards to you as you do to the employee?

A. Right, because it doesn't make any difference to the patient who's discussing it.

* * * *

[94] Q. Have you personally escorted people out of the hospital because they were violating your no solicitation policy?

A. Have I personally?

Q. Yes?

A. Yes, I have.

Q. All right, have you known other people in management to do the same?

A. Yes.

* * * *

[106] Q. You testified on direct examination that you did not have any meetings with employees to explain this rule that you posted. Can you tell us why you didn't have any such meetings?

[107] A. It goes right back to the point that we basically had not changed our policy in our application of it.

Q. I believe you also made some comment on direct examination, and I want to clarify the record, if my notes are in error, but you made some comment that there are no patients on the first floor. Can you clear that point up?

A. Yes. When I thought of first floor, I forgot about the emergency room, which is on the first floor and also a short stay unit where the people come in and recuperate, and since you have brought the question up, all admitted people, patients, coming in the hospital come in on the first floor.

Some of them may come in under their own power, and some in wheel chairs and some on stretchers, but to be admitted—labor, or delivery, or whatever the case may be—they would come through the admitting office, which is on the first floor, so to clarify it, from that standpoint, there are patients on the first floor.

JUDGE FRIEDMAN: You mean they would come in through the main entrance to the admitting office?

THE WITNESS: Right.

JUDGE FRIEDMAN: Which is located near the front?

THE WITNESS: Right.

* * * *

[108] REDIRECT EXAMINATION

Q. (By Mr. Brown) Mr. Victory, you testified on cross examination that the hospital has never changed its policy with respect to no solicitation; is that correct?

A. We have never changed the application.

Q. Why was it necessary if you never changed the application of it to write up a new rule; was it to make it [109] clear to the employees what the policy was?

A. Yes, and to answer your question directly, we felt like they needed to know what the application was.

Q. Had you ever told them about it before; had you ever explained what the old rule meant?

A. You mean did we have a group meeting and explain it?

Q. Yes?

A. No.

Q. Why?

A. Because most of the employees knew from past practice what the rule was. They had seen me, not only myself, but other supervisors directing people out of the hospital who were soliciting and selling.

Q. What type of solicitation?

A. Many kinds, insurance salesmen or maybe a religious organization would come in, and this type thing.

Q. Have you ever directed an employee out of the hospital for soliciting under the old rule?

A. No.

Q. You never have?

A. No.

Q. So, there wouldn't be any way they could know what the old solicitation rule meant with respect to an employee if you have never directed an employee out of

the hospital for solicitation; there is no way an employee could see [110] what was in effect?

A. Yes, sir.

Q. This was primarily designed to keep salesmen out of the hospital; that's what it was designed for; isn't that correct?

A. Right.

Q. Now, the new rule was not primarily aimed at that, was it?

The new rule addresses itself to employees; is that correct?

A. Right.

Q. Isn't it a fact that one of the primary considerations of the hospital in putting in this new rule is the fact that a union campaign was going on; isn't that correct?

A. I don't think so.

Q. You didn't tell me that on direct examination?

A. I think the thing that really—that the policy stemmed from was the fact that the hospital care of the patient and now, up until this time, you say you ask me whether I have ever had an employee directed out, no, but until this law changed, and I'm talking about the National Labor Relations Act, until the hospital went under it, we never had any reason to.

Q. You knew you were coming under the coverage of the Act, and you knew you were going to be organized, and you [111] thought a problem might arise, and that's why you wanted the rule in effect?

A. We wanted to be in compliance with the law.

Q. You knew a union campaign was going on?

A. We knew they had been handbilling, yes.

Q. You knew the union was in the hospital and was going to be involved in the hospital?

A. Right.

Q. You further knew that you needed some type of rules to control that union; is that correct?

A. Not to control it, I don't think.

Q. How were you terming it then?

A. Not so much to control the union as to protect our patients from whatever the results might be of the change of the law.

Q. But without regard to who it was protecting, it was in response to the activity of the union?

A. Activity of the employees.

Q. Union activity of the employees?

A. That and any other activity.

Q. But union activity was one of the things you were concerned with; is that correct?

A. Certainly.

Q. All right. Now, you gave some testimony on cross about the reason you didn't want people soliciting in working [112] areas, right?

A. Yes.

Q. Now, what does solicitation in a nonworking area have to do with patient care?

A. Solicitation in a nonworking area?

Q. Yes, solicitation or distribution?

A. What does it have to do—

Q. (Interposing.) With patient care in a nonworking area?

MR. CLARK: I object to this.

MR. BROWN: He's the one that went into it on cross examination, and I think I have a right to explore it fully on redirect.

MR. CLARK: I think the question is argumentative.

JUDGE FRIEDMAN: Overruled.

THE WITNESS: Would you ask it again, please?

Q. (By Mr. Brown) What does solicitation or the prohibition of solicitation or distribution have to do with patient care in a nonworking area, and I believe you told me earlier on direct examination that working areas were areas where patients were receiving care; is that correct?

A. Right.

Q. What does solicitation or distribution have to do with patients in a nonworking area?

A. I don't think it would have too much affect.

[113] Q. You don't think it would have too much affect on the patients in that area?

A. In a nonworking area.

* * * *

Q. (By Mr. Brown) Under the new rule, tell me again what the term solicitation means; what does that prohibit; what are you prohibiting when you prohibit solicitation?

A. You want a definition of solicitation?

Q. The hospital's definition. I want to know what you mean when you say you can't solicit?

A. It means you can't come in and solicit, I guess.

Q. Does that mean you can't come in and talk to people?

A. No, I don't think it means you can't come in and talk [114] to people, but you can't disrupt people from their work schedule. You can't prevent people from working when they are suppose to be working.

Q. The rule covers that when you can and can't talk with them?

MR. CLARK: I want a standing objection to this entire line of questioning.

JUDGE FRIEDMAN: I think we are getting into the area that counsel has objected to.

MR. BROWN: I don't think so. The rule says that you cannot solicit, and I want to know what they mean. Does that mean you can't come in and talk with the people about the union or can't come in and give them a union card?

MR. CLARK: It's for the Judge to determine what the rule in this means.

MR. BROWN: That is not so. The hospital applies the rule, the Board doesn't apply the rule. I have got to find out how the hospital is applying this rule.

JUDGE FRIEDMAN: Then, what you want is how is the rule being applied, not what does it mean.

MR. BROWN: How does the hospital apply it yes, but indirectly what does it mean as to how it's applied.

JUDGE FRIEDMAN: I think counsel is right. You are driving to the matter, but not using the right words.

Q. (By Mr. Brown) With respect to the no solicitation [115] portion of the rule, how is that applied?

A. Would you repeat that?

Q. All right. The rule says there are no solicitation of any kind during a work or nonwork time in an area accessible to or utilized by the public. How is that enforced to people who come under the rule; what does it prohibit?

MR. CLARK: Now again, he's asking for what the rule means.

MR. BROWN: I said, how was it enforced.

JUDGE FRIEDMAN: I think that—let's put it this way. Has it ever been enforced?

THE WITNESS: Has the new rule ever been enforced?

JUDGE FRIEDMAN: That's right?

THE WITNESS: Yes, sir.

JUDGE FRIEDMAN: Well, how has it been enforced, under what circumstances has it been enforced?

THE WITNESS: I think it would have been enforced with any employee whether he came in selling Avon products or came in collecting from our employees their insurance premium, or if he came in collecting or selling insurance. We would not allow an insurance salesman to come in and take an employee away from his job, and say, I want to sell you an insurance policy.

JUDGE FRIEDMAN: Would this be an employee or nonemployee?

[116] THE WITNESS: This would be a nonemployee.

JUDGE FRIEDMAN: What about an employee?

THE WITNESS: If an employee came in soliciting and telling—to answer your question, I think I see what you are getting at. An employee coming in and selling would not be,—say Avon products—we treat him—we say, you can't sell. You can't throw the employee out, but you say you can't sell. Coming in and talking to another employee, it's hard to determine whether they are soliciting or in conversation, but an employee would be permitted to solicit for the union in a nonwork area.

Q. (By Mr. Brown) What about an area open to the public like the parking lot?

A. He would be permitted to distribute or solicit in the parking lot as long as it didn't become a nuisance with litter, with the leaflets laying around to the point we had to pay people to come in and clean up, or if it became a health nuisance or whatever.

Q. That's not what the rule says, is it?

A. The rule says you can't solicit in any area.

MR. CLARK: I object to this. This is badgering the witness about what the rule says. The rule is in evidence, and it's for the Court to determine that.

MR. BROWN: I'm trying to get to the facts in the case.

[117] MR. CLARK: He ask what the rule says.

JUDGE FRIEDMAN: I will let him finish his question.

MR. BROWN: He said you can solicit out in the parking lot if it didn't interfere, and I said that's not the rule, is it.

MR. CLARK: That was not the answer with respect to literature.

JUDGE FRIEDMAN: He said he would allow it.

MR. BROWN: He said as long as it didn't create a litter problem.

JUDGE FRIEDMAN: That's right.

MR. BROWN: But, that's not what the rule says, is it?

MR. CLARK: I object again.

JUDGE FRIEDMAN: I think the rule speaks for itself. I will sustain that.

Q. (By Mr. Brown) Does the hospital intend to enforce the rule as it is written?

A. The hospital tries to enforce all rules that we publish.

Q. Do you intend to enforce this rule as it is written?

A. Yes, until we have been told otherwise.

Q. And that's the way you are doing it right now, enforcing it as it is written?

A. Yes.

Q. You gave some testimony on cross examination about [118] the fact that you wouldn't—that this rule applied to management as well as employees, right; that this rule applied to management personnel as well as employees insofar as the union is concerned; is that right?

A. I don't recall that.

Q. Didn't you give some testimony to the affect that under this rule, the supervisory personnel of the hospital would not, say, go into a room and call employees together and talk to them about the union; didn't you say that?

A. Yes, okay.

Q. Well, you don't normally hold any type of meetings in a patient's room unless it pertains to the patient, do you?

A. No, this was an example.

Q. On cross examination you gave some testimony about where patients are on the first floor. Would you repeat those areas for me where you have patients on the first floor?

A. The emergency room—

Q. (Interposing.) What building is that in?

A. That is in the Ford Annex. I don't remember the number, eleven or twelve, I believe, and it's a one story or it's on the first floor.

Q. Are patients all over that first floor, or are they confined to one particular area?

[119] A. They are confined to the emergency room in the Ford Annex.

Q. Would that cover the whole first floor of the Ford Annex?

A. Yes.

Q. Any other place on the first floor of the other buildings?

A. Well, short stay unit, which is opened from time to time and closed from time to time that there might be five or six patients, and they would be on the first floor right out of the emergency room in the south building.

Q. All right, now what are the other two buildings, primary patient buildings?

A. East Building and Central Building.
Q. No patients are on the first floor of either of those two buildings?
A. Not on a regular basis.
Q. Other than coming in and getting admitted to the hospital?
A. Coming in and leaving.
Q. Is there one location where all patients are admitted?
A. Yes.
Q. Where is that?
A. The admitting office, except in the emergency room.
[120] Q. Where is the admitting office?
A. Right off of the Twentieth Avenue entrance.
Q. In what building?
A. In the East Building—wait a minute, let me get my bearings here. It's the East Building.
Q. So, there are no admissions in the Central Building, right?
A. I believe that's correct.

* * * *

[144] Q. With respect to the cafeteria, you said that you had [145] some type of study done on the use of the cafeteria?
A. Right.
Q. Who did the study?
A. We just had it without giving any information to the manager of the cafeteria. He had the cafeteria log on patients—I beg your pardon, visitors and nonemployees and employees eating coming through the line.
Q. How would he know that?
A. All employees have an identification pin. If that person does not have an identification pin, they are charged twenty-five percent more, so if they do not have it on, they produce it. So, we know every person coming through whether they are an employee or nonemployee.
Q. The employee could get in without his pin?
A. Yeah, if he wanted to pay the price, but not many people wanted to.

Q. You could just sit down and talk. You don't have to buy something to come in?
A. Right.
Q. How many days was this study run?
A. A couple of days.
Q. Do you know how many exactly?
A. No, I really don't.
Q. I believe the figures you gave were thirty-two percent nonemployees during the week?
[146] A. Right, week days.
Q. And you don't know how many days that would range over, do you?
A. Before I answered that, I would have to ask Mr. Somerby how many days he ran the survey.
Q. Of your own knowledge, you don't know how long he ran the survey?
A. No, sir.
Q. It could have been one day, as far as you know?
A. Right.
Q. What was the figure for the weekend?
A. I believe it was fifty-three percent.
Q. Nonemployees?
A. Nonemployees eating in the cafeteria.
Q. Do you know how many weekends that was run?
A. No, sir.
Q. Did it go on a twenty-four hour basis, or was it just while the cafeteria was serving meals?
A. It would have to be within the time that the cafeteria was serving meals, because see, we close at certain hours. We open at 6:30 and close at 8:30 or 8:00, I'm not sure.
Q. What does it run at lunch?
A. 11:00 to 2:00.
Q. And then supper?
[147] A. I don't know for sure—5:30 to 7:30.
Q. A couple of hours?
A. Yeah.
Q. So, the study would have been done during the times it was open for meals?
A. That's right.

Q. And would not include other times of the day?
A. Probably no other time except serving time when they have a cashier there.
Q. Of course, it would not include people who were coming in and using the vending machines, would it?
A. No.
Q. Just people who—
A. (Interposing.) Purchased something that had to go through the cash register.
Q. And didn't include the people who brought their sack lunch and sat down and ate at the table?
A. No, it wouldn't have included those.
Q. Just people who paid through the cash register?
A. Right.

* * * *

[148] RUSSELL T. BIRMINGHAM

was called as a witness by and on behalf of the Respondent, and, having been first duly sworn, was examined and testified as follows:

* * * *

[149] DIRECT EXAMINATION

Q. (By Mr. Clark) Sir, what is your occupation?
A. I am a physician and specialize in obstetrics and gynecology.
Q. Would you give us your educational background?
A. I graduated from Union with a Bachelor of Science and graduated from Vanderbilt Medical School in 1946 with an M.D. degree, and then I did my specialty training after that, internship and three years of residency training, some of which was interspersed out with the service and armed forces as a physician, and I taught at the University of Arkansas in obstetrics and gynecology.
Q. I'm sorry, didn't understand.
A. I taught at the University of Arkansas in 1951 to 1952 and came to Nashville and went in practice following that, and I believe that's all correct.

Q. And your professional experience, it would cover how many years as a practitioner?
A. Approximately twenty-five years as a private physician.
Q. Are you a member of any professional association?
A. Yes, sir, I am a member of the Davidson County—
[150] well, Nashville-Davidson County Medical Society and Nashville OBY-GYN Society and Tennessee and American Medical Associations.
Q. Have you held any office in any professional association?
A. Yes, I have been secretary-treasurer and later president of the Nashville Obstetrical and Gynecological Society and secretary-treasurer of the Davidson County Medical Society.
Q. Dr. Birmingham, the Baptist Hospital here in Nashville, Tennessee has a rule which prohibits any form of solicitation in areas of the hospital where the solicitor would come in contact with a patient or guest of a patient. I would like to show you what that rule is. If you would please, Doctor, take your time and read this rule and let the record show I am pointing to paragraph eight of the complaint.
A. Yes, sir, I have read it.
Q. Doctor, in your professional opinion, is there any legitimate medical reason for having such a rule?

* * * *

[151] THE WITNESS: Yes, sir, I think for a medical reason that such a rule is necessary.
Q. (By Mr. Clark) In your experience as a practioner for a number of years, Doctor, in your opinion is the attitude of the patient or the attitude of the patient's family, does it have any bearing on the recovery of the patient?
A. I think the attitude of the patient and the attitude of the family both have a great deal to do with the recovery.
Q. Can you elaborate on that any more?

A. In the patient where there is any emotional problem that arises within the family, when the patient is in the hospital, we certainly try and shield the patient as much as we possibly can from any bad news of any kind, a car wreck where other members of the family have been injured, and things like this. In the hospital it's where we have multiple patients in the same room, if there are conflicting situations for these people, you try to work this out as harmoniously as you can, and when you have to go to a waiting room area where you are going to meet a family where you have operated on a patient where the patient is in surgery, certainly, if you have bad news for these people, you try to take these people to a family [152] area where you can talk with these people in privacy with respect to their needs for privacy, realizing too the effect that the news is going to have on other people waiting there too.

Q. If Baptist Hospital should change its existing rule as is suggested by counsel for the General Counsel in such a way to permit solicitation by employees in the presence of patients for purposes of union activity, in your professional opinion, would this result adversely insofar as the medical care of the patients there?

MR. BROWN: May I have a continuing objection on this line?

JUDGE FRIEDMAN: Yes, you may have a continuing objection.

You may answer, sir.

THE WITNESS: I think if the discussion becomes volatile or hostile in any form, I think this very definitely would have the potential for adversely affecting the patients and the patient's families.

Q. (By Mr. Clark) Have you practiced medicine at Baptist Hospital?

A. Yes, I have.

Q. For about how long have you done that?

A. About twenty-five years now.

Q. Are the patients at Baptist Hospital confined to [153] their rooms, or are they mobile?

A. Of course, you are going to have all sorts of graduation of illnesses of patients. Some of the orthopedic

patients in traction, obviously, they can't move around, but you have the patients who are coming in for preliminary tests. They are up and around the hospital, and you have patients as they recover, and they are up and about the hospital in various areas throughout the hospital.

Q. Do you know of situations where a patient would be checked in the hospital for, let's say, a very serious operation, but would be undergoing preliminary tests, and during those tests, this patient would be able and permitted to move about until the operation comes about?

A. Yes, sir.

Q. That actually happens?

A. Yes, it certainly does.

Q. In your experience as a doctor, have you had occasion to rearrange patients because of the fact one patient is upsetting a patient for some reason?

A. This happens not infrequently. This may vary from somebody playing their television set too loudly to smoking or visitors or what have you. Yes, this very definitely happens.

Q. Why do you make this change; what is the reason that motivates you to move the patient under those circum- [154] stances?

A. Well, they actually threaten each other with physical violence at times. It will get that hot with them. Again, this comes back to your trying to keep the patient —you are more considerate about their emotional well-being.

Q. I want to ask you one hypothetical question, and then I will have no other questions at this time.

Let's assume that the existing rule that you have just read at Baptist Hospital here in Nashville has changed. Let's assume that the new rule that's put into effect would permit solicitation for various causes, controversial subjects, policies, religion or unions or whatever it might be, and the hospital puts in effect this rule which does permit this kind of solicitation in the presence of patients and in the presence of visitors of patients.

Let's further assume that a patient has checked into the hospital to undergo a serious operation and has been

permitted by you or some other doctor to move about in the hospital in the various areas within the hospital, lobby or cafeteria or halls or elevators or the various areas in the hospital which patients now go prior to this serious operation.

Let's further assume that this patient is seated in the cafeteria with members of their immediate family at [155] a table, and that a nurse comes in with a number of union handbills handing them out to various employees or other nurses in the cafeteria, and a heated discussion erupts between two nurses, one promoting the union and the other pointing out the disadvantages of having a union, and let's further assume in the course of this discussion there is a talk of strike at the Baptist Hospital if the union demands on the hospital are not met when the union presents its status as a majority representative of the employees, and assuming those facts, in your professional opinion and judgment, could this have any bearing on the success or failure of the operation?

MR. BROWN: Before he answers, again, I would like to object to this question. This hypothetical has no basis. It's not posed on any facts in evidence at this time. There is no evidence that any of these things would happen should the hospital change their rules. I don't think it's a proper hypothetical question, and I object to him giving an opinion on it.

MR. CLARK: Before you rule on this question, I would like to make one comment.

We have in evidence the fact that there is a rule in effect now at the Baptist Hospital, there has been a statement, at least by counsel, and testimony by Mr. Victory to the effect there has been discussion of a possible [156] settlement of this case which would involve the changing of this rule in accordance with what General Counsel has requested which would permit solicitation in the presence of the patients and the visitors, and there is testimony that the hospital has considered very seriously the question of changing the rule and conferred with various doctors concerning their opinion as

to whether or not this would have an impact on patient care.

There is testimony that the insurance rates with respect to malpractice have increased tremendously.

JUDGE FRIEDMAN: I will take notice that this has happened all over the country.

MR. CLARK: There is testimony that this gentleman French who has brought these charges against the Respondent did in fact come into the cafeteria with handbills soliciting other employees to join the union.

There is testimony that a number of rank and file employees complained they were being harassed and interfered with in the performance of their work. All of this evidence, Your Honor, is in the record right now, and up until this point is not in dispute, and I think with this foundation, certainly we can ask this expert and get testimony as to what would be the impact on patient care. That's why we are here.

JUDGE FRIEDMAN: Overruled. You may answer, sir, [157] if you remember the question at this point.

THE WITNESS: Well, as I remember the question, it is if you are going to have a situation where it boils down and their discussions are getting pretty heated and all, is this going to affect the families and patients who would be present at this time.

* * * *

[159] Q. (By Mr. Clark) After getting the hypothetical facts, Doctor, I asked the question, could this heated discussion have any bearing in your professional opinion, your judgment, upon the success or failure of the operation?

A. I certainly think it would. I think that the tranquility, by the very nature of what you are trying to provide for them, this is what you would want, and anything that would mostly upset them or a heated thing, I think it would be—it certainly would have no benefit.

* * * *

Q. (By Mr. Brown) You have no experience in the field of labor relations, do you?

A. (Witness shakes head negatively.)

Q. Did you play any part in the drawing of this rule [160] you just read?

A. No, sir.

Q. Did you advise the hospital on it before they drew it?

A. No.

Q. With what degree of medical certainty can you say that the action in the hypothetical would have on a patient; can you tell us what affect it would have?

A. You want me to quote you percentages?

Q. Can you tell us what affect it would have?

A. No, sir, we are talking about some of the intangibles that are involved in patient care.

Q. It might not have any affect?

A. I doubt that, but it's possible, that's right.

Q. All right. Do you personally know of any patient who has ever been injured by any type of union solicitation or discussion?

A. Well, now you said any type of solicitation.

Q. Any type of union solicitation?

A. When you said hurt, do you mean a noise or beyond that or what?

Through the hospital for example there have been times when members of a religious group have come through the hospital going from room to room and some people have been very upset by these things. People who are physically [161] ill are more emotionally upset by any of these things, but no, I can't say that about union activities. I have never seen this occur in the hospital.

Q. You have never known of anybody adversely affected by union solicitation?

A. I have never seen it occur.

Q. Would it change your opinion any if we changed up the hypothetical a little. Instead of the situation occurring, let's say in a work area of the hospital where the patient is receiving treatment, do you know if it

would have any affect on a patient if someone who standing out in the parking lot soliciting [sic]?

A. If the patient was not aware of it, I don't know that it would bother the patient in the least.

Q. What about in any other area where patients don't normally go?

A. Again, I would have to come back and say if the patient's family is not aware of these things where the employees are not carrying it back in contact with the patients, no, sir, I certainly would not.

Q. And you don't know whether union solicitation might become violent or volatile, do you?

A. No, sir, I do not.

Q. That's purely speculative?

A. Are you asking about in regard to Baptist, or what [162] I have read?

Q. You don't know whether any solicitation might become volatile or violent?

A. No, sir.

Q. It is just speculation?

A. If I'm going to speculate, I will have to say I have read of instances where they have been aware of violence in picket lines and things of this sort.

Q. But, you don't know of it to ever occur at Baptist?

A. No, sir, I don't know.

Q. What if the solicitation does not become volatile; would that injure a patient?

A. No, sir, I don't think it would.

If two nurses are bickering, if this is overheard, yes, sir, I think this sort of thing would be distressing to somebody.

Q. But, if it's a normal conversation between one employee who asked one employee to sign a union card, that wouldn't have any affect?

A. No, sir.

Q. Or a friendly conversation about unions would not have an adverse affect?

A. I don't think anybody would be aware of the conversation.

Q. Do you know of any bickering that has gone on down [163] in Baptist over the years—well, let me qualify

that. Have you seen any conduct down there that would upset patients concerning the union?

A. No, sir, I have not seen any.

* * * *

CLYDE RUSSELL FRENCH

was called as a witness by and on behalf of the General Counsel, and, having been first duly sworn, was examined and testified as follows:

* * * *

[164] DIRECT EXAMINATION

Q. (By Mr. Brown) Have you ever been employed by the Baptist Hospital here in Nashville?

A. Yes, sir.

Q. In what capacity?

A. Nursing assistant.

* * * *

[171] Q. While you were working at the hospital, did you ever become aware of any attempt to unionize the employees?

A. Yes, I did.

Q. How did you learn of that?

A. It was in August of 1974, I was in the cafeteria and having supper with Mr. Lightford when another employee joined us, and he told us then there was a union organizing campaign going on.

Q. Did you make any comments?

A. Yes, I said I thought a union would be a good thing.

Q. Where was Mr. Lightford seated?

A. He was at the table.

Q. Was he close enough to hear what you said?

A. Yes.

Q. After you learned that the attempt was being made to organize the employees, did you have direct contact with the union?

A. Yes, I did. The next thing I did was obtain an information card, and this card has a place to express [sic]

[172] in the union, and I checked the place which indicated I would be willing to do committee work, and I mailed this in, and the union sent me back an authorization card and I filled that out and signed it and returned that by mail.

Q. What happened after that?

A. The next contact was on September 3rd, that morning, I called the union hall and told them there was a lot of prounion sentiment at the hospital, and I would be willing to help them, and I wanted to meet with them to find out what I could do.

Q. Did you meet with them?

A. Yes, sir, I met them that afternoon at the Krystal Restaurant.

Q. Who did you meet with?

A. Johnny Roberts and Clyde Brzezinski.

Q. What took place?

A. They answered all the questions and they gave me some authorization cards and some other union material.

Q. What did you do with those cards?

A. In the next few weeks, I distributed them at the hospital during my break periods.

Q. How many cards did you hand out?

A. I would guess about two hundred cards.

Q. Where did you normally distribute these cards?

A. Down in the cafeteria.

[173] Q. Any place else?

A. The snack bar and locker rooms.

Q. How about outside the building, did you ever do any distribution outside the building?

A. Yes.

Q. When did you normally do this card distribution?

A. Either on my break periods or after work or before work.

Q. Did you ever have a conversation with any of the supervisors about the union?

A. Yes, I have.

Q. Would you tell us about that, when was that, and who with?

A. September 15th, I was in the treatment room of eight central south when Mr. Lightford came in and he told me then that Mrs. Mathis had told Miss Addie Hamilton that I was the leading union instigator at the hospital.

Q. Did you have any comment?

A. I told them I figured they knew about it, and I wasn't worried because I figured the law would protect me.

* * * *

[180] Q. Did you have any conversations with any employees that day about the union?

A. Yes, I did.

Q. Would you tell us where that took place and when?

A. On my break about 9:00 o'clock that night I talked to two dietary employees in the cafeteria.

Q. How did you happen to talk with these employees?

A. I just went in and got coffee and they were seated at a table, and I assumed they were on their break, so I sat down with them.

Q. What did you talk about when you sat down with them?

A. I asked if they had signed the authorization cards I had given them previously. The conversation was very brief, and I got up and left, and I moved to another table.

Q. Did you do anything to detain them?

A. No, I didn't.

Q. Did you know whether or not they were working when you sat down?

A. They were sitting down, and I assumed they were on break.

Q. Where were they in the cafeteria?

A. One of the tables in the cafeteria.

* * * *

[190] Q. Were you in the hospital on or about January 30th of 1975?

A. Yes, I was.

Q. What was your purpose in going down there?

A. I went down there to get my pay check for the previous week, and I stopped out to see some friends in the cafeteria.

Q. What time did you get there?

A. A little after 6:00 o'clock in the evening.

Q. What happened when you went to the cafeteria?

A. I didn't see anybody, so I sat down and in a few moments I saw Miss Edens who is the charge nurse, and I started over to sit down and talk with her, and while I was walking over Mr. Joe Hampton called me, and I turned back to talk with him, and he told me then, "French, you know what I told you the last time you were here," and I told him yes, I did, and he asked me to leave, and I asked him, isn't this open to the public, and he said not for you it isn't, [191] French, and I told him I wasn't leaving, and I went and sat down with Miss Edens.

Q. Who is Mr. Hampton?

A. I believe his title is assistant vice-president.

Q. What happened after you sat back down?

A. A few minutes later, a few security guards came and ask me to leave. They escorted me first to get my pay check, and then out of the building.

Q. I didn't hear the last part; would you repeat that?

A. Two security guards came and asked me to leave, and they escorted me first to get my pay check and then out of the building.

Q. Where do employees normally take their breaks?

A. In the cafeteria or the snack bar.

Q. Where is the snack bar?

A. It's right off the cafeteria.

Q. To what extent do they use these utility rooms to take breaks in?

A. Very few people use the utility rooms.

Q. All right. Do you know where the dining area is in the laundry building?

A. Yes, I do.

Q. Do employees—do you know to what extent employees use that?

A. I'm over there everyday, but at the time I'm there, [192] I don't see people, but that's usually about 2:30 in the afternoon.

Q. How far is it over there?
A. It's across—wait behind the hospital. You have to cross Patterson Street. It takes maybe five minutes to walk down there.
Q. With respect to where you work, where do you work in the hospital normally?
A. I usually work in the Central Building.
Q. With respect to where you work, would it be closer to go to the cafeteria or the laundry building?
A. It would be closer to the cafeteria.
Q. Where does most of the hospital work, what area, most of the employees are in the laundry room or—
A. (Interposing.) Most of the employees are on the south side of Patterson.
Q. What building?
A. The Central Building, the south building, the east building and the Ford Annex.
Q. Do patients normally, are they normally found on the first floor of let's say the Central Building?
A. No, not normally.
Q. To what extent do the patients use the cafeteria in the Central Building?
A. Just on rare occasions. I have seen patients down [193] there, probably to talk with their children. Well, you can always tell the patients, as they will be in their pajamas and bathrobe. I think they have to get special permission to leave the floor.
Q. From your observation, who is in that cafeteria the majority of the time?
A. Employees and visitors.
Q. More employees or visitors?
A. I would have to say more employees.

* * * *

[203] CLYDE RUSSELL FRENCH

took the witness stand and testified further as follows:

CONTINUED DIRECT EXAMINATION

* * * *

[206] Q. Have you ever interfered with the work of any employee while you were soliciting for the union or distributing any literature?
A. I can't remember any instance like that.
Q. Where did you normally discuss the union with the other employees?
A. In the cafeteria.
Q. Where do the other employees normally take their breaks and eat their meals?
A. In the cafeteria.
Q. With respect to the cafeteria, there has been testimony when it's open. Do you know whether it's closed in between those times?
[207] A. I believe you have access to the cafeteria about any time of the day.
Q. Even when meals are not being served?
A. That's correct.

* * * *

[278] GREER RICKETSON, M.D.

was called as a witness by and on behalf of the Respondent, and, having been first duly sworn, was examined and testified as follows:

* * * *

DIRECT EXAMINATION

Q. (By Mr. Clark) Doctor, would you spell your name?
A. Yes, G-re-e-r Ricketson, R-i-c-k-e-t-s-o-n.
Q. What is your profession, Dr. Ricketson?
A. Medical doctor specializing in plastic surgery.
Q. Would you tell us your educational background?
A. Yes, A.B. degree from Vanderbilt, 1938, M.D. from Duke University School of Medicine 1942, a year's internship at Duke and went into service for three years and came out and returned to Duke and remained a resident in general surgery for three years. This brings us to 1948, at which time I went to Charity in Louisiana in New Orleans as a resident in plastic surgery for two

years and stayed in practice with my professor in New Orleans until February, 1953, at which time I moved to Nashville and have been practicing medicine since that time.

Q. And in addition to your practice of medicine, have [279] you taught medicine?

A. Both on the faculty of Tulane University as an instructor and since coming to Nashville, Chief of the Plastic Surgery Residents and teaching program at Vanderbilt up until two years ago, at which time I gave up the chief, but still am a clinical professor of plastic surgery at Vanderbilt.

Q. Have you practiced medicine at all at Baptist Hospital in Nashville?

A. Yes, since almost when I came to Nashville.

Q. Doctor, there is a rule in effect at Baptist Hospital which is in issue in this case we have before us. The rule that prohibits any form of solicitation in areas of the hospital where the solicitor would come in contact with the patient or guests of the patient.

Now, prior to putting you on the stand, I believe I let you read that rule, and I will get it out again where you can see it.

All right, let the record show that I am showing Dr. Ricketson paragraph eight of the complaint in this case. Have you had an opportunity to read that rule?

A. Yes, sir, I have.

Q. In your professional opinion and judgment, is there any legitimate medical reason for having such a rule?

MR. BROWN: I object for the same reasons.

[280] JUDGE FRIEDMAN: Yes, and I will overrule, and you have a continuing objection.

MR. BROWN: So, I will have to pose no further objection?

JUDGE FRIEDMAN: No, you have a continuing objection.

Q. (By Mr. Clark) Is there any medical reason for having such a rule in your opinion?

A. Yes, sir, quite a few reasons as a matter of fact.

Q. Can you tell us why a rule such as this is necessary in the hospital, in your opinion?

A. First, let me state that I am concerned with the patient's care first, and any other business that might take place in the hospital as far as I as a doctor am concerned, is strictly secondary. So, if I feel any activity within a hospital regardless of whether it be a meeting of some sort or otherwise, I feel interferes with the well being of the patient, then I think it ought not to take place, and without getting too verbose, and we all know a hospital is a place that is a busy place, things are going on continuously all the time, and the people there have jobs to do, and they have to take care of the patients and not only do they have to take care of them, but have to take care of them in the most efficient, quiet and unassuming manner; in other words, not to disturb the patient. A good many of the patients can be upset mentally, psychologically [281] and anyway you might like and may have a definite affect on the outcome of the case as to whether they get well or not.

For instance, a heart case, maybe he's on a monitor or a pacemaker or whatnot, and certainly this type of case you would want him to be perfectly quiet and at ease both physically and mentally, because of the mental upset would raise his blood pressure and might throw him into fibrillation from overupset or tension, so that would be one type of case, and take a cancer case. The patient and the family is on pins and needles to start with. Is he going to get through the operation he's going to have. If he gets through the operation, is he going to be cured, or is he still going to have cancer and all these things play in the affect and the patient's mental attitude is important as well as his physical attitude when he arrives in the operating room as to how well he's going to withstand the trauma of the operation, and so, all these things are important, and what I am saying, there shouldn't be any unnecessary turmoil, confusion, loud noises and things going on that would upset a patient or the patient's family because they go back and if something happens to a patient's family that is upsetting in the hospital, because they go back in and their feelings wear off on the patient, and they themselves irritate the patient by talking about [282] a fight that

took place on the first floor or something like that, so it's necessary that they have to maintain an atmosphere of calm and cool.

Q. Are all the patients in the Baptist Hospital here, Dr. Ricketson, confined to their rooms, or is there a certain mobility?

A. No, it's a general hospital. A lot are confined to the room and a lot are confined to the beds, but there are patients which are not as sick which may go other places in the hospital.

Of course, in the normal treatment, they are transported a lot and are transported to the X-ray Department which may be three or four or five floors down or maybe transported to the laboratory or other parts of the hospital, and a patient who is not particularly sick and fortunately, in my particular field they are there for things that means something to them, say a cosmetic operation, but usually they are permitted to go other places. They can go down to the lobby. I think most of you know we don't permit young children upon the floor, and if the children want to visit them on Sunday afternoon, we can let the patient go down to the lobby when we don't let the children go up to the floor, so they can move around like this and go get a hamburger and coke, or something like that, providing their physical condition is such it won't be detrimental to their [283] care.

There are places like physical therapy and all these other places, but you might say the area of the hospital is a patient area with—well, I started to say like the business office, but that's the most important part as far as the hospital is concerned, but anyway, they are all over the hospital in many places.

Q. Do you know if it occurs where you have a situation where a patient is about to undergo a serious operation but is checked into the hospital a day or two in advance for tests which would allow the patient to visit certain public areas of the hospital such as the cafeteria, the main cafeteria?

A. Yes, oh yes. This can happen, and as a matter of fact we may give them a two hour leave if they want to

go out and eat dinner at a public restaurant. We allow them to go out as long as they check back in.

Q. During your professional career, have you had occasion to rearrange assignments of patients to rooms or move one patient from another patient to avoid any upsetting conditions?

A. Yes, in the ward space where you have two beds, four beds or multiple places, it is not unusual at all to have to move a particularly disturbed patient out, say, if he's mentally disturbed and carrying on and raising sand, [sic] or if he's hurting a whole lot and for some reason [284] we have to move them out, and sometimes it's frankly just a particularly obnoxious patient in the room, and sometimes say from smoking where it disturbs others, and as a matter of fact, recently at Baptist Hospital we put in a rule where the patient that has to be moved out of the ward is the one that is causing the disturbance, and if he has to be moved to a private room to calm the situation, we have made the rule now the one doing the disturbing has to go to the private room. He has to pay the extra fee, whereas, before we didn't have this, and we had a make shift way and tried to move them around, and this is something we put in recently for just what you are talking about.

Q. What is the general practice in your field with respect to giving any bad news to patients or families of the patient insofar as where you would deliver this message?

A. Well, of course, I guess the two or three real items of bad news that could happen, one is to tell them that the patient is not going to get well or tell them this patient has a malignancy, or incurable disease of some sort, and the other is to tell them their relative or the patient has died, and we have places in the hospital which we call conference rooms where say a patient has deceased to talk to the family.

It's entirely—say, he died in a two-bed or three-bed ward place and we take the family to the conference room [285] to discuss the situation with them.

It's the same way as far as other bad news. We have just operated on the son or mother or something

like that and you never know exactly how a family will react to bad news.

So, we try to take them in a quiet area where if they over react or what we think will disturb everybody else or get them in a spot, if they need to be sedated to be able to tolerate the bad news, so, it doesn't disturb everybody else on the floor and whatnot.

Q. Doctor, I would like to present a hypothetical factual situation and ask you two questions, based upon these two hypothetical facts.

Let's assume that the existing rule now in effect at the hospital, the rule which you just read—

A. (Interposing.) Yes, sir.

Q. (Continuing.) —is changed to conform with the theory of General Counsel's case which says we must permit solicitation between employees ever in the presence of patients and their guests for union activity purposes, and let's assume further that there is a patient who is scheduled to undergo a serious operation who has checked into the hospital and is in the main cafeteria, as you say it happens from time to time, and let's assume that this person is seated with her family in the cafeteria, and that a nurse [286] comes into the main cafeteria there with a handful of union leaflets passing them out to other nurses in the cafeteria and soliciting these other nurses to sign union cards to bring the union in at Baptist Hospital.

Let's further assume that a heated discussion occurs between two or more nurses concerning the advantages and disadvantages of having a union at Baptist Hospital, and this discussion includes the possibility of the nurses going out and walking out on strike if the hospital does not meet the union demands.

Question number one, in your professional opinion and judgment, could this kind of a discussion in the presence of one of your patients have a bearing on the success or failure of the operation?

MR. BROWN: Before he answers, Your Honor, I want to make a specific objection to this hypothetical question.

I don't believe it's stated exactly properly as to what our contentions of the case are.

JUDGE FRIEDMAN: I was going to say that.

MR. BROWN: We are not contending that anybody is entitled to solicit in a work area, but we are only contending they are entitled to solicit in nonwork areas on nonwork time. We are not contending that anybody is entitled to solicit in a work area in front of a patient, and I believe that's not stated properly.

[287] Q. (By Mr. Clark) Without regard to what General Counsel's theory is, let's assume that the facts I have just stated are true, deleting your reference to what your theory of the case is—are you still with me?

A. I believe I am.

Q. With those hypothetical facts and in your professional opinion and judgment, could this situation in the main cafeteria have any bearing on the success or failure of the operation you perform on the patient?

A. Yes, I think so on the patient certainly, and as I have tried to explain, psychological attitudes play a good part. If we have a patient that has made up his mind that he's going to die, they can almost will themselves to die.

It is one of the things that doctors just—it's almost like a superstition, you might say, so it's a positive point, but the point I would make in regard to your question, it doesn't matter whether it's union, and I understand this case has to do with rules and regulations between employers and unions, but it would be the same thing if somebody came through and was selling or soliciting the football gambling sheets.

In other words, there is a nonprofessional attitude going on within the area of the hospital, and if the patient is there, he begins to wonder what kind of a damned hospital [288] is this. Are they more interested in this than taking care of me, or the family may react the same way, or they may say we thought we were going to a good general hospital whose prime purpose is to get them well if possible and keep them comfortable, and here we see other activities that do not have to do

with the taking care of patients and the business of the hospital, and they will get quite upset about it, and not only plain mad at the hospital, but the patient can get quite upset and disturbed and think I must not be in too good a place, and if this sort of thing happens in the room, what's going to happen in the operating room, are they going to stop and get in an argument about something else there.

So, it does work, and I would think it would play a part.

Q. Can you tell us whether or not the medical profession has had any recent problems in the flood of malpractice claims?

A. Well, I think all we have to do is read the paper there. Yes, we have had a flood of malpractice claims. Many, of course, which in my opinion and fortunately in the judge's opinion are not well founded, but back to the theory as to why, well, there are several reasons why, and one or two of them is because it has become a popular thing to do, and another way it's an easy way to make some [289] money if you can win a suit, and I'm not sure that the lawyers aren't involved up to a point as far as the contingency fee is involved, but we won't go into that, but as far as the patients are concerned, most of the patients who sue a doctor or the hospital is because of something happened that they are disturbed, not the one where the doctor leaves a sponge on or actually there is damage done to the patient, but a lot of nuisance suits where they sue and say, well, the result didn't turn out very well, and most of those are because the patient and the doctor have not gotten along well, and the relationship has been poor or they have gotten mad at the hospital about something.

To illustrate a little further, if the patient is not so sure about the result, and I push him for his bill, it may be all it takes for him to decide to turn around and sue me.

Well, the same way in a hospital, if things aren't going smoothly and if he leaves the hospital mad at the hospital, even though his result was good, if he thinks he can figure out a way to sue the hospital, he will, so,

a lot has to do with the whole attitude of the patient, and I'm sure a lot of the malpractice is a result of disgruntled patients when actually the treatment has been fine.

Q. In view of your experience over the years, Dr. Ricketson, as a practitioner and as a professor or a teacher, [290] what exposure would there be, if any, in your judgment if Baptist Hospital were to change the existing rule to a rule which would permit soliciting for union activity in the presence of patients?

MR. BROWN: Your Honor, again, I want to make a specific objection to that. I think the question is far too speculative. There are no facts in the record to support such a hypothetical question, and I would like to object to it on that basis.

JUDGE FRIEDMAN: As I stated, yes, I quite realize the basis and ordinarily I would not permit a hypothetical that was not based on facts actually in evidence, but in this instance, I think we have to look to the future and the possibility of something happening in the future rather than something that happened in the past.

MR. BROWN: There is no evidence that something like this may happen.

JUDGE FRIEDMAN: I think that's what the doctor is testifying to. It's purely hypothetical, and we would judge it in that light.

Q. (By Mr. Clark) Go ahead, Doctor.

A. Do you mind asking me again?

Q. What exposure, if any, do you see the hospital having in changing this rule which prohibits this kind of activity to a rule which would permit union activity from [291] the standpoint of malpractice?

A. I think all the answers I have given since I have been sitting here would be what I think, and what I think would be turned around a hundred and eighty degrees. They are all the answers I have given to your questions which would be violated if you turned it around where any type of solicitation, and again, not just union solicitation, but the same thing with any solicitation, an insurance man wants to come up and stop and talk to

the people at work, or up and down the hall, and that would be just as bad, and there is no place for that in the hospital, and I mean, the hospital is a place for sick people and people having things done, and I'm sure there is a place for all these things, and I'm not against any of them, but as long as I am taking care of patients, I don't want anybody bothering them except me, and if they want to get mad at me, I would rather it be at me rather than a disturbance.

MR. CLARK: Thank you.

CROSS EXAMINATION

Q. (By Mr. Brown) Dr. Ricketson, do you have any expertise in the labor field?

A. No expertise. My only contact is among employees in my office, but as far as knowing anything about labor law or any contact with labor settlements or so forth, I fortunately have never had that problem, so I don't have any [292] expertise.

Q. When is the first time that you became aware of the rule which the hospital now has in affect which you have read today?

A. From a rule as such, probably two or three months ago.

Q. How did you—

A. (Interposing.) Excuse me, as just a physician, I would have assumed there was such a rule, or I would have almost assumed there didn't have to be a rule.

Q. When was the first time you saw this particular rule?

A. Two or three months ago when they asked would I be willing to come down and give my opinions as to this type of thing.

Q. How far back would that be?

A. Gosh, I don't know. No, it probably was in February, because I know I had just moved to my present office the last of January, and it was right after I moved in there and I didn't have things straight, so it must have been February.

Q. Did you advise the hospital in drawing this thing

up, or did they come to you and question you what should go in a rule of this nature?

A. They didn't, no, and I don't know if you are aware [293] of the fact I am chief of staff at Baptist, and as a result I am responsible for the care of all the patients in that hospital, so anything of this nature that has to do with patients from here on out—I don't know how old the rule is, but I would anticipate having something to do with it.

Q. You are not saying that you were advised before this rule went into effect?

A. No, not on this one. My attention was called, as I say, the first of February or something like that.

Q. Do you know of any adverse affects which union solicitation may have had on a patient at the hospital?

A. I don't know that I can nail down any particular instance at all. In fact, as I say, I'm even surprised that they even considered any type of solicitation, whether it be union or otherwise within the hospital.

Q. Do you know what—can you say what effect it would have on a patient?

A. Well, I think—again, do you want to tie the word union or just disturbance in the hall?

Q. Union solicitation; do you know what affect it would have?

A. First, may I ask the question to be sure you and I understand; what is union solicitation, what does it consist of?

Q. Let me give you a few more facts and now, I will [294] give you a hypothetical.

If solicitation were, shall we say, a nonvolatile or non-argumentative nature, would it have any adverse affect on a patient?

A. I'm picturing this. Someone who belongs to a union and talks to an employee of the hospital, whether it be a nurse—

Q. (Interposing.) Two employees talking about the union?

A. Oh, well, certainly if it takes place during the course of the working hours, they are interfering with their job.

Q. I'm talking about the effect on the patient hearing that?

A. Only to the point that if it becomes a disturbing factor. This doesn't have to be a fight or argument or heated discussion or something like that, but as I think I testified, the fact that they think these poeple who are suppose to be taking care of them have their mind on something else other than taking care of them while they are in the hospital, yes, I think it would.

Q. What about if they are doing that on nonwork time?

A. It wouldn't matter, nonwork or work time, if it takes place where a patient could overhear; in other words, the patient doesn't know that the person is taking a coffee [295] break and isn't working for the next fifteen minutes.

Q. If they are sitting in the cafeteria, it would be assumed that the employee wasn't working?

A. Yes.

Q. Two employees sitting in the cafeteria drinking a cup of coffee, the patients wouldn't assume they were working, would they?

A. Probably not. They would know they were on duty, and they would assume they are having a coffee break. The average patient would, and most of us would. I suppose as far as two people sitting there talking, I don't think it would make a whole lot of difference.

Q. As long as it was a friendly nonviolent situation?

A. If it became a routine affair where this takes place in the dining room all the time, yes, I would be opposed to that, but as far as people sitting there and talking to each other, I don't think that would make any difference, but again, thinking of the overall affect, how do you control it, how do you say two people can talk about this quietly on the side, but nobody else can have a general meeting. In other words, well, I would say if a man got on his soapbox and stood up to make a speech in the dining room that would be bad, so how are you going to divide the two, and if it was up to me, if I was running it, the dining room wouldn't be a place to carry on outside activities.

[296] Q. What about other areas of the hospital. There are areas where patients don't normally go, aren't there?

A. Sure, there are lounge areas, there are places where the employees change their clothes and things like that. That's all together different. When they are there, they are not on duty, as you say, and the patient dosen't go there, and I'm not sure they don't get down there and shoot craps sometimes, and that's sort of a ridiculous suggestion, but in a lounge, when a nurse is on a break, there are places they can go and get away from the patients and employers too, so they can do whatever they want to.

Q. What about—

A. (Interposing.) I would think this would be the ideal area to discuss this.

Q. Excuse me, I didn't mean to interrupt you, but what about outside in the parking lot?

A. I don't know that would be a big factor, but I would personally be against a group meeting, but as far as person to person discussion, I wouldn't object to it at all. I think coming and going to the hospital, there is no reason two people can't talk about anything they want to because you are not likely to come in contact with the average patient. Well, any patient, I think, would know here's somebody coming to work, and they want to talk about the football game or union or the church religion or anything.

[297] Q. That would apply to any area outside the hospital?

A. So long as it wasn't a public meeting, so to speak. In other words, suppose the patient looks out of the room and hears a gathering or they are having a fifteen minute conference in the waiting area or outside the room, and this might disturb them, but as far as coming and going and talking about whatever they want to, that wouldn't make any difference at all.

Q. Do you know that there would be confusion or loud noise if solicitation were allowed?

A. Again, you have to qualify it. I'm sorry, but a one to one sort of thing is not as you say in the coming

and going, but in a group meeting. I mean—you know, if I was giving a speech and trying to convince somebody of something, I would be as emphatic as I could, and if it took an inflection of the voice or something, I would do it.

Q. Where are the patients or where do they normally stay in the hospital?

A. Well, normally, ninety percent—maybe not ninety percent of the time, but most of the time, of course, they are in their room.

Q. Yes.

A. And then they are transported, as I mentioned earlier, they may be transported from the eighth to the fourth [298] floor operating room or physiotherapy or second floor, which is X-ray, and they may be transported—well, they come in one side where the admitting office is, and the business office is on the other side, and so except for personnel lounges, places they can change their clothes and so forth, they may be mostly anywhere in the hospital, either in the process of being transported or, if they are able to move about.

Q. But, not normally any place but in the room and going back and forth to eat?

A. Some or quite a few are in the lobbies and are maybe down there to get another dollar to pay for newspapers, but there are areas not much, but where the patients are. Same way with the cafeteria. There are probably a small percentage eating in the cafeteria.

Q. Do they have to have special permission to do that?

A. Yes, they have to have special permission to leave the floor, as a matter of fact. The nurses have to be told where they are going and when to expect them back.

Q. Do you know of any malpractice claims that have ever arisen over union solicitation?

A. No, sir, I don't.

Q. Do you know for a fact that such claims would arise if the solicitation rule now in affect were to change?

A. No, sir, I sure don't. I have an opinion as I [299] related as to disturbing and sending a disgruntled patient home.

* * * *

EXAMINATION

Q. (By Judge Friedman) You mentioned you were chief of staff, and I presume that's the medical staff?

A. Yes, sir.

Q. It has nothing to do with the administration of the hospital?

A. I am the liaison man between the medical staff and the Board of Directors, and I tell the medical staff how the doctors are doing, and if we need some new equipment, I have to report to the Board once a month, but as far as administration, I have nothing to do with administration, it is strictly the medical area of the patients.

MR. CLARK: I do have one other question.

REDIRECT EXAMINATION

Q. (By Mr. Clark) Do you have any financial interest in the hospital?

A. No, sir.

* * * *

[300] CONTINUED CROSS EXAMINATION OF MR. FRENCH

* * * *

[314] Q. How many union cards did you get signed?

A. I would guess about fifty, either handed back to me or I was directly responsible for being signed.

Q. And how many did you attempt to get signed?

A. I handed out a few hundred cards.

Q. A few hundred?

A. A couple of hundred cards.

[315] Q. What period of time was that that you did this card signing?

A. From September the 4th until September the 15th, there were, I worked one more day September 22nd.

Q. Pardon me?

A. I worked one more day on September 22nd, and I did hand out some cards then.

Q. So, between September 4 and September 15, you actually solicited two hundred persons to sign union cards, and you actually obtained signatures on fifty; is that a correct statement?

A. To the best of my knowledge it is.

Q. Where did you conduct that union activity?

A. Most of it was done in the cafeteria.

Q. In the main cafeteria of the Baptist Hospital?

A. Yes, sir.

Q. And when did you do this?

A. On my break periods or after work or before work.

* * * *

[329] Q. All right. Isn't it true, Mr. French, that each person solicited in the cafeteria did not give you a warm reception?

A. That's not my recollection. I asked if I could join them and sat down and talked with them. I was never —I wasn't asked to leave by any of the five people we are talking about.

Q. I am not confining my question now to the 22nd of September, 1974. I am asking you generally, isn't it true that on many occasions in discussing the union with people in the main cafeteria that you did not always get a warm [330] reception; isn't that a true statement?

A. That's correct, and I usually—I can't recall what I would do on that—if somebody asked me to leave, normally I would leave.

Q. Isn't it true some people even refused to take your literature?

A. That's correct.

Q. Isn't it also true that some people were very hostile and antagonistic in this discussion of the union?

A. I never had any sharp words told me at the time. I didn't have anybody to tell me to take my literature and shove it or anything like that.

Q. Is it your testimony here today that you did not receive from any employees a hostile reaction?

A. Not what I considered a hostile reaction.

Q. Isn't it true that you did make a sworn statement before the NLRB that you did receive a hostile reaction from employees?

A. You are referring to Miss Edings and Christensen.

Q. I am referring to two employees who you solicited who became very hostile.

A. Well, Miss Edings—

Q. (Interposing.) And answer my question. Isn't that true?

A. I can't recall my testimony.

[331] Q. Without regard to what your sworn testimony is, the truth of the matter is there were two employees you solicited to sign union cards that became hostile, very hostile?

A. Well—

Q. (Interposing.) Yes or no?

A. At this time, I would not describe their action as being very hostile.

Q. They were not very hostile; is that your testimony?

A. They were not prounion.

Q. Would you characterize their reaction as not being hostile?

A. Hostile to me?

Q. Hostile on the subject of the union?

A. Yes, they were antiunion, hostile to the union.

Q. They were hostile to the union?

A. Hostile to me, no.

Q. Hostile on the subject of the union?

A. They were antiunion, and I believe you would call that hostile to the union.

Q. In fact one of them was so hostile that she said if the union came in, she would walk out and quit.

A. Yes, Miss Edings said she would quit.

Q. This was said publicly in the main cafeteria?

A. That's where we were.

[332] Q. There was no doubt in your mind as to how these two individuals felt about the union?

A. No.

* * * *

Q. I will ask if it's not true, Mr. French, that you gave a sworn statement to the NLRB on the 18th day of October, 1974 to Bernard Aronstam concerning two employees that you had solicited to join the union in the cafeteria, and in which you said that on September 11th at about 6:15 p.m. [333] that after you had made this solicitation and—here, I'm beginning to quote, "both of them expressed open hostility toward the union, and Mrs. Edings said she would quit if the union came in"?

A. That's true, that statement is correct, they did express open hostility toward the union. I misunderstood. I thought you meant open hostility toward me.

Q. So, the truth of the matter is that you found some people who felt strongly in favor of the union and some who felt very hostile against the union; isn't that true?

A. Yes, that's true.

Q. And this discussion of hostility or favortism [sic] toward the union took place in the main cafeteria?

A. Repeat that?

Q. You have just testified that a number of people that you talked to during the course of the campaign expressed their likes and dislikes with respect to the union even to the point of being openly in support of or openly in opposition to the union; is that true?

A. Yes, that's true.

Q. And some of that reaction you got was in the main cafeteria?

A. Yes.

Q. In fact the incident I just talked about was in the main cafeteria?

[334] A. That's correct.

* * * *

[339] Q. (By Mr. Clark) Well, was the 22nd of September, 1974, [340] the only occasion in which you had solicited for the union in the cafeteria.

A. No.

Q. There were numerous times?

A. Yes.

Q. Did you receive any reprimand for those instances?

A. No, I didn't.

Q. So, to your knowledge, you are the first employee that you know of that has solicited in the cafeteria in which no reprimand was received?

A. I think the correct answer to that is yes.

Q. Do you wear a uniform when you work?

A. No, I pick up my uniform after I get to work.

Q. You do wear a uniform in your work?

A. Yes.

* * * *

[346] Q. I will go on to something else. Is it true you have gone from table to table in the main cafeteria passing out union literature?

A. That's correct.

Q. On a number of different occasions?

A. Yes.

* * * *

[374] JESSIE LEE WHITE

was called as a witness by and on behalf of the General Counsel, and, having been first duly sworn, was examined and testified as follows:

* * * *

[375] Q. (By Mr. Brown) Mrs. White, are you employed?

A. Yes, I am.

Q. Who do you work for, please, ma'am?

A. Baptist Hospital.

Q. What job do you have at the Baptist?

A. Dietary department, cafeteria.

* * * *

[382] CROSS EXAMINATION

Q. (By Mr. Clark) Mrs. White, did I understand you to say you were not on break?
A. No, sir, we were not on break.

* * * *

[383] Q. Have you ever seen other employees other than French soliciting in that cafeteria?
A. Yes, I have.
Q. What happened as a result of that?
A. Well, they asked her to leave. The hospital said she wasn't suppose to be on the hospital property soliciting literature like that.
Q. Who was this individual that was doing this soliciting?
A. It was a lady. She was trying to sell Avon.
Q. Who was it that made her leave?
A. Mr. Bradley. He's not employed there now.
[384] Q. Have you ever seen anyone else in management make anyone leave?
A. I sure have.
Q. Who else?
A. Mr. Victory over there.
Q. Who was the person he made leave?
A. He was a car salesman.
Q. This was in the main cafeteria?
A. Yes, because this was the person I was talking to.
Q. This was in the cafeteria?
A. She was in the cafeteria and went back to the dietary department, and he had to make her leave from back there.
Q. Have you ever known of any church groups that anyone has tried to make leave?
A. No, sir, I haven't.
Q. You don't know about the church groups?
A. No, sir.
Q. As far as you know, Mrs. White, the rule which the company enforced with respect to the Avon lady and

with respect to the car salesman has been the rule all along in the cafeteria?
A. That's right.

* * * *

[388] WILLIE LUMPKIN

was called as a witness by and on behalf of the General Counsel, and, having been first duly sworn, was examined and testified as follows:

* * * *

[389] Q. Who do you work for, please, sir?
A. Baptist Hospital.
Q. How long have you been working for the hospital?
A. I have been there around sixteen months.
Q. What do you work full or part-time?
A. Full-time.
Q. What job do you have?
A. I am a nursing assistant.

* * * *

[393] Q. Where do employees normally take their breaks?
A. Well, as far as supper breaks are concerned, they usually take them in the cafeteria or snack bars. They are in the hospital, you know, and regular fifteen minute breaks can be taken, I guess, anywhere out—to put them out of a working situation.
Q. Is there any place where they are normally taken, or do you know?
A. Not that I know of.

* * * *

[399] FURTHER REDIRECT EXAMINATION OF MR. FRENCH

* * * *

[403] Q. Why did you utilize the cafeteria as an area in which to hand out cards?
A. This is where most people took their breaks.

* * * *

[405] Q. During any of the times that you were talking with any of the employees in the cafeteria, were there any real incidents; you said two employees were openly hostile toward the union; did that create any type of disturbance?

A. No.

Q. Were there any other disturbances created in the cafeteria by your solicitation?

A. No.

[406] Q. Did anybody ever start shouting in there when you approached them?

A. No.

Q. What did you normally do when you approached somebody and they said they didn't want to talk to you or didn't want to have anything to do with the union; what did you do?

A. I excused myself and left.

* * * *

[409] W. T. VICTORY

was recalled as a witness by and on behalf of the General Counsel and testified further as follows:

* * * *

FURTHER REDIRECT EXAMINATION

Q. (By Mr. Brown) Mr. Victory, you testified on direct examination, and correct me if I am wrong, but I believe you testified on direct examination that the hospital had consulted with some doctors prior to the time they put this rule into effect on October 4, 1974?

A. No, I don't believe I did.

Q. Maybe, I misunderstood you.

A. I believe you did.

Q. Did you consult with anyone other than your attorney [410] about putting that rule into effect?

A. Nothing other than management, my superiors and our attorney.

Q. But, you didn't actually receive any advice from any physician as to what the affect might be on the rule or the absence of the rule?

A. No, sir, I don't believe I testified to that.

* * * *

[416] FURTHER RECROSS EXAMINATION

Q. (By Mr. Clark) This consultation you discussed yesterday with doctors, Mr. Victory, occurred after I contacted you concerning possible settlement by suggesting you study a possible change in the rule?

A. That's right, the rule was written—

Q. (Interposing.) And you and management and the doctors discussed whether or not this case could be settled in such a way that would be acceptable to the Board, in such a way that the doctors could operate in a way the [417] hospital should?

A. That's correct.

Q. And did you consult with the doctors about that?

A. That's correct.

Q. And as a result of the consultation with the doctors, you determined that there was no way the case could be settled?

A. Right.

* * * *

[475] MR. BROWN: Let the record reflect that Mr. French is retaking the stand.

(Whereupon, Mr. French retook the stand and testified as follows.)

* * * *

Q. Have you ever handed out any cards or distributed any union literature while you were on duty?

A. No, I haven't.

* * * *

[476] JUDGE FRIEDMAN: I will ask you one more question.

Have you ever distributed literature or solicited membership in the union even though you were off duty, but the people were on duty?

A. I don't know of any instances like that.

* * * *

Q. Yes. His Honor has just asked you the question [477] on any occasion did you ever solicit anybody for membership in the union from any employee who was on duty while you were off duty, and you said it didn't happen?

A. I will say I never knowingly solicited employees that I knew were on duty.

Q. But, there may have been instances that you solicited people thinking they were on break, but they were on duty; is that correct?

A. That's correct.

* * * *

G.C. Ex. No. 11-*id.*

[SEAL]

BAPTIST HOSPITAL
2000 Church Street
Nashville, Tennessee 37236

C. DAVID STRINGFIELD
Executive Vice-President (615) 329-5213

October 4, 1974

The solicitation and distribution policy of Baptist Hospital has been revised. This has been done to help protect the privacy and rights of employees as well as to help maintain a good working environment and appearance throughout the hospital. The policy is as follows:

"No solicitations of any kind, including solicitations for memberships or subscriptions, will be permitted by employees at any time, including work time and non-work time in any area of the Hospital which is accessible to or utilized by the public. Anyone who does so will be subject to disciplinary action. In those work areas of the Hospital not accessible to or utilized by the public, no solicitations of any kind, including solicitations for memberships or subscriptions, will be permitted at any time by employees who are supposed to be working, or in such a way as to interfere with the work of other employees who are supposed to be working. Anyone who does so and thereby neglects his work or interferes with the work of others will likewise be subject to disciplinary action.

No distributions of any kind, including circulars or other printed materials, shall be permitted in any work area at any time."

/s/ W. T. Victory, Jr.
W. T. VICTORY, JR.
Vice President—Personnel

/s/ C. David Stringfield
C. DAVID STRINGFIELD
Executive Vice President

EMPLOYEE HANDBOOK

[BH EMBLEM]

INSIDE BAPTIST HOSPITAL

IMPORTANT

Please sign, detach, and present the acknowledgment card in the back of this booklet to the Personnel Department.

THANK YOU

G.C. Ex. No. 12 (*id.*)

EMPLOYEE HANDBOOK

The Why, What and How of Personnel Policies

Revised August 1, 1973

BAPTIST HOSPITAL
2000 Church Street
Nashville, Tenn. 37236
Phone: Area 615—329-5555

Name .....

Date .....

Department .....

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Your employee Handbook is compiled for general information only. These matters, however, are subject to change from time to time, and without much if any advance notice. This Handbook will be revised, when necessary, to show these changes as soon as possible after they have been made. The hospital reserves the right to make final decisions as to the interpretation of these policies and practices.

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EMPLOYEE STATEMENT

Welcome!

. . . to a new career adventure at Baptist Hospital! Welcome to our hospital family . . . Welcome to the challenges and satisfactions of helping others as a member of the Baptist group.

We exist solely to provide superior medical care to all those needing our services.

Your job and personal contribution is vital if we are to succeed in providing medical care to our community at a level of quality satisfactory to those we serve.

The success and future security of each of us, in every job at Baptist, depends upon how well we do our jobs together.

We hope to merit your loyalty, dedication and pride. We pledge ourselves to assist you in your duties in every way possible.

/s/ Gene Kidd
GENE KIDD
President

Baptist Hospital is here for service which means it's a people-to-people operation.

To serve people well requires a team of superior people whose daily contacts bespeak devotion to mankind and Christian endeavor.

Your employment here brings YOU personally and significantly into our people-oriented business making YOU a part of our hospital team. And only absolute teamwork, dedication and generosity can effect the hospital's total aim.

This brochure attempts to acquaint you with the hospital's employee relations policies and its profile of service.

It has been prepared to provide you with basic information about your responsibilities and benefits. Please request an explanation of any part you do not understand.

/s/ C. David Stringfield
C. DAVID STRINGFIELD
Executive Vice President

WHY: GOALS AND PURPOSES

Without employees, Baptist Hospital would be nothing but equipment, brick, mortar and could accomplish nothing. Patients are our business and they look to you for care. Since this is primarily a service Institution for the citizens and communities, the staff must assist those who come to us for help at any hour—day or night. A hospital cannot make its own pattern of activity. It must be in operation 24 hours daily.

We urge you to become acquainted with the purposes and goals of the hospital. Every job is Important and every employee has a serious responsibility in his work to support and contribute to the overall effectiveness of the hospital's team efforts in providing comprehensive patient care.

The hospital's goals for all departments and employees are:

- To treat all patients with sympathy, kindness and understanding, realizing that sickness and hospitalization may be new and a trying experience.
- To recognize and understand the needs of all patients and to cooperate with them in solving satisfactorily their health problems.
- To give expert nursing care and to provide scientific aid to the nursing and medical professions.
- To provide members of our medical staff with the best environment and facilities for the care of patients.
- To improve, by educational activities and appropriate research, the practice of medicine, total patient care, and the overall management and operation of this hospital.
- To encourage all employees to obtain personal satisfaction and self-improvement from their work. We expect employees to cooperate with hospital officials and to develop a serious sense of responsibility and loyalty.
- To offer all employees of this hospital a fully satisfactory condition of employment and to contribute as much as possible to the total pattern of wholesome living for them and their families.

WHAT AND HOW: BEGINNING AT BAPTIST

Interview—Baptist Hospital is an Equal Opportunity Employer and does not discriminate in employment because of race, creed, color, national origin, age or sex. All persons seeking employment will be given a pre-employment or "screening" interview at the personnel office. If a vacancy exists, those meeting the hospital's requirements for employment will be referred to the appropriate department.

Tests—Applicants for employment may be required to take qualifying examinations or tests as determined by the hospital. They will be subject to employment investigations of their work background and personal references. Only fully qualified applicants will be considered for employment.

Placement—The hospital policy is to place an individual in a job for which he or she is best suited and qualified in order to utilize fully the capabilities of that individual. Job description and analysis are used as an aid to proper placement. If one feels qualified or better suited for service in another classification, you should state this to your Department Head.

Orientation—As a new, permanent employee, you will receive an orientation by the Personnel Department within a few days after being employed. Hospital policies, procedures, benefits and responsibilities are explained at this meeting.

Identification—You will be issued an identification card bearing your name, photograph and identifying information. This must be carried at all times while on duty or when visiting the hospital for any reason. When you terminate employment with the hospital your final paycheck will not be issued until your identification card is returned to the Personnel Department.

You will also receive a pin with your name and department from the Personnel Department. This pin must be worn while on duty. Replacement pins can be ordered at a small fee.

Handbook—All employees should read this Handbook carefully, and ask your Supervisor if you have any questions. The Employee Statement in the back of this publication should be signed and on file in the Personnel Department before the first check will be issued.

WORK SCHEDULES

The basic workday is eight hours and the basic workweek is forty hours. The hospital workweek begins at 12:01 a.m. on Monday continuing through midnight of the next Sunday. You will be informed by your Supervisor about your normal work schedule and about any subsequent changes.

Attendance—Because of the urgent nature of hospital work, regular attendance by all employees is very important. Employees are expected to notify their Supervisor or Department Head of any impending absence as far in advance as possible. Unauthorized absence is regarded as sufficient cause for discharge.

Tardiness—Employees must check with their Supervisors when they report late for work or find it necessary to leave work early. Common courtesy requires an explanation for tardiness. Frequent tardiness will be regarded as sufficient cause for discharge.

Days Off—The hospital operates permanently on a seven-day basis; most hospital workers must expect some weekend and holiday duty. In those departments where weekend and holiday coverage is necessary, it is the hospital's policy that these duty assignments be rotated in a fair and equitable manner among all members of the staff. Every effort will be made to see that each employee receives two days off each week whenever possible and no less than four days off in each two week pay period.

Full Time—Employees who are assigned for an indefinite duration and work a normal work week of 40 hours, receiving no special consideration in scheduling relative to hours, weekday or shift rotation, are classified as full-time employees. They will be entitled to all benefits and personnel privileges described herein.

Part Time—This group includes persons employed for positions of short duration, usually for emergencies or summer vacation replacement; or persons working less than forty (40) hours per week; or those who receive special consideration in scheduling relative to hours, weekday or shift rotation.

Employees who agree to work a minimum of twenty-four (24) hours a week are entitled to participate in the group hospitalization insurance benefits by partial payment of the premium, and vacation as outlined in the part time vacation policy.

Breaks—Within the limits of good patient care and job accomplishments, employees will be provided with one fifteen (15) minute rest period in each four-hour tour of duty. These rest periods must be arranged with the knowledge and approval of your immediate Supervisor and must not interfere with proper functioning of the work units or the department.

Overtime—Overtime will be considered time worked in one week that is in excess of forty (40) hours as established by Federal Law. Employees working overtime as described above will be paid at 1½ time their regular hourly rate.

The hospital discourages overtime work in consideration of the needs of employees to have sufficient relief and rest. Because of the around-the-clock nature of hospital work, however, it may be necessary for employees to work overtime.

Overtime must be requested and authorized by the appropriate Department Head or Supervisor. Odd minutes worked before or at the end of the shift during the pay period may not be accumulated as overtime.

TIME CARDS, SALARIES AND WAGES

Time Cards—Time cards are used in the department as directed by Administration. Employees will be responsible for recording their own time. Under NO circumstances may you sign another person's time card. Altering the time card in any manner, having time card punched by another employee, or punching another em-

ployee's time card is cause for suspension or discharge. Changes, alterations or notations on time card may be made by the Department Head or Supervisor only and must bear that individual's signature.

Payday—The time and method of distributing payroll checks may change from time to time, and this information will be made known to you by your Department Head or Supervisor.

Because of the many factors involved in computing your paycheck, five (5) days are required to prepare the checks for distribution after completion of the pay period.

Paycheck—A check endorsed and lost is the same as losing cash, and the bank or hospital cannot be responsible. It will be helpful to the hospital's accounting system if employees will cash their checks promptly.

Payroll Deduction—Only deductions required by law or authorized in writing by employees will be withheld from pay. These include: Federal Social Security tax (the hospital matches the employee's payment with both payments credited to the employee's account with the Social Security Administration) and Federal Income Taxes. Employees may authorize deductions for the Credit Union, retirement, dependent hospitalization, dependent life insurance, United Givers Fund, Pharmacy charges, U.S. Savings Bonds, etc.

Anniversary Date—All employees establish an anniversary date on the day of their employment (or reemployment).

PROBATIONARY STATUS

The first three months after employment will be considered a probationary period during which time either the employee or the hospital may initiate termination without explanation or further his obligation. This is a trial period for both employee and employer to determine suitability and interest in the work and to provide the opportunity for an adjustment period.

Employees who fail to respond to counseling concerning attendance, conduct or performance problems may be

placed on "Imposed Probation" from one to three months on the authority of their immediate Supervisor or Department Head.

BENEFITS AND GENERAL RULES CONCERNING THEM

Holidays—A full-time permanent employee is eligible for authorized holidays after completing 30 days of employment. Part-time employees are not eligible.

The authorized Holidays are: New Year's, Memorial Day, Fourth of July, Labor Day, Thanksgiving, Christmas and Employee's Birthday after completion of one year of service.

Holidays on Week End—If the Holiday falls on Saturday, it will be observed on the preceding Friday. When the Holiday falls on Sunday, it will be observed the following Monday.

Compensating Day—Since all employees cannot be off on the holidays, another day off may be taken. The day off must be taken within thirty (30) days and approved by the Department Head.

Holidays Not Taken—No pay or credit is given for holidays not taken within the specified time.

Day Off—In the event a holiday falls on a regular day off, another day is given.

Absence—Employees who are absent the day preceding or following a holiday, other than regular days off, are not eligible for holiday credit or pay. If an employee is absent when scheduled to work on a holiday, no holiday credit or pay is due.

Hospitalization Insurance—Blue-Cross — Blue Shield plus major medical insurance is provided by the hospital at no cost to the employee. This health coverage can be extended to the employee's family with the payment of the additional premium required for family coverage. Detailed information is available at the Personnel Office.

Dependent Group Life Insurance—A Dependent Group Life Plan is provided for you if you are a full-time permanent employee with six months of service. The hospital pays the entire cost of your insurance and makes available, dependent coverage on your family at a very low cost to you. The amount of the policy varies depending upon your salary. A more detailed outline of the Plan and its benefits are explained at your Orientation.

Retirement—The retirement age is sixty-five (65). Persons over sixty-five may continue employment subject to the approval of Administration. Detailed information is provided in a separate booklet entitled, "Your Retirement Plan," and may be obtained through the Personnel Office.

Social Security—Baptist Hospital participates in the Federal Social Security Program. As prescribed by law, a per cent of your earnings is deducted annually from your salary. This money is matched by an equal contribution from the hospital for you. Benefits are provided for total disability and retirement if you have been covered by Social Security long enough to be eligible. Retirement benefits are in addition to any private retirement plan benefits you may receive.

Tax Deferred Annuity—As an employee of Baptist Hospital, a nonprofit organization, you are eligible to participate in this savings plan with special tax advantages.

Workman's Compensation—As a hospital employee, you are enrolled under the Workman's Compensation Law of the State of Tennessee. This gives you protection in case of an accident, injury or illness as a direct result of your job. In order to be eligible for Workman's Compensation, it is important to see that all accidents, no matter how minor, are properly reported and brought to the immediate attention of your Department Head.

JOB POSTING—TRANSFERS AND PROMOTIONS

Vacant positions will be posted each day on the employee bulletin board.

Written request for transfer should be made in the Personnel Department.

Transfer will be made from within the hospital whenever possible. However, it is the responsibility of Administration to fill job openings with the best qualified people available. Vacancies will be filled in one of the following ways:

1. Qualified employees from within the department having the vacancy.
2. Other qualified employees within the hospital.
3. Qualified applicants from outside the hospital.

Promotions are based primarily on your ability to perform the work and loyalty to the hospital. If these two qualifications are relatively equal with those of other employees, then your seniority as compared with others in your department will be the determining factor. Employee qualifications for promotion are determined by the Department Head concerned. All promotions are subject to the approval of Administration.

VACATIONS

The importance of the annual vacation as a period for rest and relaxation is well recognized by Baptist Hospital.

Eligibility—All permanent full-time employees are eligible for vacation as outlined below.

Computation of Vacation Pay—Regular rate of pay: 1 week equals 40 hours (5 days—8 hours); 2 weeks equals 80 hours (10 days—8 hours).

Vacation Period—The vacation period covers the entire calendar year, January 1st to December 31st, inclusive. Your Supervisor will try to arrange your vacation date to your satisfaction. However, vacation periods will be arranged so that they do not interfere unreasonably with the work requirements of the hospital.

Schedule First Vacation:

Employment Date	Vacation (Following Year)
Jan. 1—Feb. 28	10 Days After Jan. 1
Mar. 1—March 31	9 Days After Jan. 1
April 1—April 30	8 Days After Jan. 1
May 1—May 31	7 Days After Jan. 1
June 1—June 30	6 Days After Jan. 1
July 1—July 31	5 Days After Jan. 31
Aug. 1—Aug. 31	5 Days After Feb. 28
Sept. 1—Sept. 30	5 Days After Mar. 31
Oct. 1—Oct. 31	5 Days After April 30
Nov. 1—Nov. 30	5 Days after May 31
Dec. 1—Dec. 31	5 Days After June 30

Second, Third, and *Fourth Vacation*—10 days, to be taken any time from January 1 to December 31.
Fifth Year Vacation—11 days
Sixth Year Vacation—12 days
Seventh Year Vacation—13 days
Eigth Year Vacation—14 days
Ninth Year Vacation—15 days
Twentieth Year Vacation—20 days

Vacation time may be held over; however, not more than five working days of vacation credit may be carried forward from one year to another. Approval must be granted by your Department Head, and he must submit a change of status form, signed by the employee, at the end of the year denoting the number of hours to be carried forward into the next year.

Vacation shall accrue only when an employee is working or is on authorized absence with pay.

Split Vacations—Employees are encouraged to use at one time all their available vacation. However, a split vacation may be approved in extreme circumstances; or in accordance with the hospital's program requirements; and upon approval of the employee's Department Head.

Holidays Occuring During Vacations—When an hospital authorized holiday falls during the employee's scheduled vacation period, the employee may take a substitute holiday at a later time mutually agreeable with his Department Head.

Vacation Reduced for Absences Over 60 Days—If an employee is absent 60 days or less in any one calendar year, no vacation credit is lost for the next year. After 60 days of absence there shall be deducted from his next vacation one day for each 30 days of consecutive absence.

Disability or Death During Vacations—No compensating vacation days are allowed for disability, or a family member's death occurring during an employee's scheduled vacation.

Vacation at Termination of Employment—

1. Employees leaving voluntarily and in good standing or retiring will receive pay for vacation time earned but not taken during the current year, as follows:

When You Are Entitled To TWO WEEKS Vacation And Your Last Working Day Is In:	You Will Be Paid For:
January	1 day
February	2 days
March	3 days
April	4 days
May	5 days
June	6 days
July	7 days
August	8 days
September	9 days
October or later	10 days

When You Are Entitled To THREE WEEKS Vacation And Your Last Working Day Is In:	You Will Be Paid For:
January	3 days
February	6 days
March	9 days
April	12 days
May or later	15 days

2. No vacation or compensation in lieu thereof is given in the following cases:
   a. When employee terminates prior to one year of continuous service.
   b. When employee is discharged for cause.
   c. When employee leaves without proper notice.

Vacation—Part Time Employees—Employees working more than 1248 hours in one calendar year will receive pro-rated vacation the following calendar year.

LEAVE OF ABSENCE

A leave of absence without pay may be granted to any full-time permanent employee after 6 months of service.

All leaves of absence must be presented in writing to the proper Department Head. The Department Head must finalize terms of the leave with the Personnel Office prior to the effective date of the leave.

Each request shall be decided upon its individual merits and must be approved by the Department Head.

A leave of absence may be granted up to a maximum of six (6) months. Request for extension of leave of absence must be in writing and will be subject to approval of Administration.

The privilege of returning to work, however, is to be subject to employment conditions prevailing at the time

of return. It may be necessary to replace permanently an employee on leave because of the difficulty in recruiting people willing to work as temporary replacements. Should this happen the hospital will attempt to, but will not be required to, return employees to their former job after a leave of absence.

A leave of absence, when granted, protects an employees's accrued service record. Benefits do not accrue during leave of absence, but will be picked up when employee returns from a leave of absence.

Accepting other employment while on leave or overstaying a leave of absence without proper notification and approval constitutes an automatic resignation and subsequent loss of all benefits.

Funeral Leave—Beginning with the first day of employment the Department Head may approve up to a maximum of three (3) days with pay for a full-time employee to attend the funeral of any member of his immediate family.

This is restricted to spouse, mother, father, son, daughter, sister, brother, mother-in-law and father-in-law.

Funeral leave pay will be granted for regularly scheduled work days only.

Maternity Leave—An employee may be granted leave without pay for maternity reasons if she indicates in writing her intention to return to her position within six (6) months.

Written approval from the employee's physician must be given if she is to continue work during pregnancy.

Military Leave—A full time permanent employee who is required to serve a tour of duty in the Armed Forces is eligible for all earned vacation time or pay.

When an employee on Military Leave returns from a tour of duty he will be re-instated in accordance with the law.

National Guardsmen and Reservists may be granted leave without pay to attend required summer training, if requested 30 days in advance. Regular vacation time may be used if desired.

Educational Leave—Leave of absence without pay may be granted to any full-time permanent employee after six (6) months of service.

A request for leave of absence must be presented your Department Head indicating in writing your intention to return to Baptist Hospital within 30 days of completion of course of study. The Department Head will finalize terms of the leave with the Personnel Office 2 weeks prior to its beginning.

Each request shall be decided upon its individual merits and must be approved by the Department Head.

A leave of absence may be granted up to a maximum of three (3) years. However, employee must request an extension of leave at the end of each six months of leave. This request must be in writing and should include the present status of the student, name of the school attending, and expected date of completion of study.

A leave of absence, when granted, protects an employee's accrued service record. Benefits do not accrue during leave of absence, but will be picked up when employee returns from a leave of absence.

If an employee who has been granted a leave of absence fails to return to work at the expiration of the leave, or requests an extension, his employment is deemed to have been terminated as of the original date such leave was granted.

Sick Leave

Accumulation of Sick Leave—Beginning with the date of employment each full-time permanent employee shall receive sick leave credit at a rate of one (1) day per month of employment up to a maximum of thirty (30) days.

Terms—An employee's first three (3) days of absence from work due to illness is not covered by the hospital's sick leave policy except when an employee is confined to a Hospital on the first day of illness. When an employee is so confined, the waiting day is waived and sick leave with pay will begin with the first day of illness.

Notification of Illness—An employee absent because of illness shall inform his immediate supervisor as soon as

possible prior to the time he is expected to be at work. Failure to inform one's supervisor within a reasonable time may be cause for denial of sick leave for the period of illness.

Certification of Illness—Proper certification of illness requires a medical certificate from the employee's physician; or a medical certificate from a physician selected by the hospital; and/or other administratively acceptable evidence of illness.

Sick Leave for Holidays, Vacation and Leave—Employees absent from work on holidays authorized by the hospital, or during sick leave, death leave, vacations, or special leave with pay, shall accumulate sick leave during their absence as though they were employed to the maximum limitations herein provided.

Utilization of Sick Leave—An employee may use his sick leave upon approval of Administration, or his delegated representative for absence due to illness, or injury, or exposure to contagious disease which could be communicated to other employees or patients.

Absence for a part of a day, when that absence is chargeable to sick leave, shall be so charged proportionately in an amount not less than one-half (½) day. Employees shall be charged with four (4) hours of sick leave taken before the mid-point of the work day and four (4) hours for leave taken after the mid-point of the work day.

Accumulated sick leave will be used until disability coverage is effective (which is the first day following one month disability). At this time your sick leave pay will be discontinued and you will receive disability benefits. Any remaining accumulated sick leave time will be carried forward for your future use.

Expiration of Sick Leave—Upon the expiration of all vacation pay and accumulative sick pay (as outlined in above) an employee will be placed on health leave and disability coverage if eligible.

Disability Income

Eligibility—Each full-time permanent employee (under age 65) is eligible after six (6) months of continuous service.

Benefits—After the qualifying period of one (1) month of disability, the plan pays 50% of normal monthly gross earnings (before taxes) to a maximum benefit amount of $1,000 a month.

The benefits paid will be reduced by payments from:

Workman's Compensation
Primary Social Security
Any other employer sponsored group, wholesale or franchise insurance plan

Benefits are payable during the continuance of total disability for two (2) years.

RULES AND RESPONSIBILITIES

It is true that an employee at Baptist Hospital has many rights, but also must bear responsibilities as well. Therefore, he should make note of the responsibilities deemed important by the hospital administration.

Accidents to Patients and Visitors—If you witness or discover an accident in which a patient or a visitor is injured, you should give all assistance possible and then report the incident to a nursing service supervisor and to your Supervisor. If the person is seriously injured, do not attempt to move him until a staff physician or a nursing service supervisor approves it.

Changes To Be Reported—Your paycheck, insurance, mailings, etc., depend upon accurate record information. In addition, we want to know when additional education is completed. Any change in name, address, telephone number, marital status and/or number of dependents should be reported immediately to the Personnel Department where an employee Change-Of-Status form will be prepared for these adjustments in your record.

Confidential Information—The personal nature of work in the hospital often reveals confidential information about individual patients. Do not discuss this highly confidential information except as required in the performance of your duties. Even casual conversation with other employees may be overheard and thereby violate the right of privacy of others. Be particularly careful

about your conversation in elevators, eating places and other places of public assembly within the hospital.

Disaster Plan—Our hospital, as all hospitals, must be ready at all times to handle an emergency situation under any condition. You will be given a copy of the Disaster Plan which outlines general organization and procedures for internal and external disaster problems and disaster threats. Your Department Head will acquaint you with your specific assignment, and you should become familiar with the Plan. Remember, one of the most important things you can do in a disaster situation is *remain calm.*

Endorsements—Employees are asked not to endorse any particular individual, service or product allied to or connected with the hospital field. In the event someone comes to the hospital with an urgent request for a physician, direct him to the Emergency Room where doctors on our staff handle emergency calls.

Employee Accident—If you are hurt or become ill while on the job, report immediately to your Supervisor or to the supervisor of the department where the accident or illness occurred. If your condition is serious, report at once to the Emergency Room. In the event you sustain an injury while on duty, regardless of how minor the injury may be, an accident report must be prepared by your Supervisor.

Employee Conduct—As a hospital employee at Baptist you have high standards to maintain. You are urged, therefore, to refrain from loud talking and laughing, gossiping, needless complaining, and any other activity that would be disturbing to the patient or out of place in a hospital. By being kind, courteous and considerate with patients, the public and your fellow workers, you will accomplish more with them and get more satisfaction from your work. Thoughtfulness and cheerfulness are important at all times, particularly in hospital surroundings. Remember, the employee is here because of the patient!

Employees benefit or suffer according to the reputation of the place they work. Similarly, their place of employment benefits or suffers according to the reputation of the

people who work there. Your off-duty conduct, therefore, is expected to be of the highest moral character and quality.

Mail—All employees are asked to make provisions to have personal mail delivered at their home or residence address.

Noise—Noise deters patient treatment and recovery. It is each employee's obligation to avoid unnecessary noise in the hospital. Speak in a quiet, pleasant tone; use care in handling equipment, avoid clashing dishes, glassware and metallic objects. Employees should be alert for sources of unnecessary noise and to report these promptly to their Supervisor.

Package Inspection—Employees are urged not to bring packages or bundles into the hospital. Packages being removed from or being brought into the hospital are subject to inspection by the security officer or any person in authority. An employee attempting to remove property other than his own, without proper authorization, from hospital premises is subject to immediate dismissal.

Payroll Advances—Because of the complexity of preparing the hospital payroll, advances in pay cannot be given. Emergency needs may be met through the Credit Union by arranging for a small, low interest loan.

Personal Appearance—Personal neatness and appropriate attire enhance the employee's professional appearance and will inspire confidence in his ability. Employees are asked to use good taste in selecting clothes worn on the job, avoiding extreme styles; use cosmetics moderately; have a conservative hair style in good taste; and do not wear excessive jewelry.

Public Information—All employees are cautioned *not* to give out information about any patient's condition to anyone without specific authorization as outlined below. To do so may involve you in legal action.

1. Inquiries from friends and relatives are to be directed to the unit's head nurse, to the area supervisor or to the Nursing Service Office.

2. Inquiries from newspapers, radio and television stations and other sources of public information are to be referred to the Public Relations Director. (Please refer to the hospital's official "Code of Communications" Guideline, available in the Public Relations Office.)

3. Questions from patients about their bills, specific charges, insurance program benefits, or method of payment are to be referred to appropriate personnel in the hospital business office.

Public Relations—You are Public Relations. Everyone has Public Relations—good or bad—whether he likes it or not. The public judges our hospital by the manner and attitude of its employees. It is imperative, therefore, that we conduct ourselves in a manner which will bring credit to our hospital.

To the public YOU are the hospital.

Planned Public Relations is simply "putting your best foot forward" by your attitude toward yourself and others; by your knowledge of your subject to help others; and by your skill in communicating to others. Remember, Public Relations always starts with you.

Safety—It is very important that you familiarize yourself with the Safety Program of Baptist Hospital. This program is routinely practiced at the hospital and may be obtained from your Supervisor. The primary purpose of this program is to protect you, patients and visitors from injury by providing the safest possible working conditions and by teaching safe methods on all jobs. A well-planned safety program is always in operation, but it cannot succeed without your full cooperation. Report to your Supervisor any unsafe conditions including wet or slippery floors, equipment left in halls or on walks, defective equipment, careless handling of equipment, etc. The hospital welcomes your suggestions for creating safe conditions and eliminating work hazards.

Smoking—Employees are not allowed to smoke in their work areas, including nursing stations, hospital corridors or patients' rooms, but should check with their Supervisor to learn of approved smoking area. Remember, smoking is a fire hazard as well as a serious health hazard.

Solicitors—In order to protect employees from any form of solicitation, raffle, charity drives, etc., it is strictly prohibited for anyone to solicit patients or visitors while on hospital premises without written approval from Administration. Violation of this policy will subject employee to disciplinary action. Employees who discover persons making unauthorized solicitation should report this immediately to their Supervisor.

Strangers and Difficult Persons—The proper handling of difficult persons is important in order not to disturb patients. In all cases make the situation known to your Supervisor and seek immediate aid if possible from qualified hospital personnel. *DO NOT* use force except in self-defense against other employees, patients or visitors. To do so may make you liable for any damages or injuries.

Telephones—You are requested to use the public telephones when making personal calls. Telephones in offices and at nursing stations are to be used for hospital business only. You should request friends and relatives not to call during working hours except for emergency messages. Such messages should be referred to the Personnel Office where they will be delivered to you.

Telephone Courtesy—Your courtesy in using the telephone can make work more pleasant for you and for those with whom you deal. When using the telephone, please keep in mind the following rules:

1. Answer telephone promptly giving your name and department.
2. Speak in a pleasant tone of voice.
3. Avoid long conversations.
4. Replace the receiver gently.
5. Transfer call tactfully and only when necessary.
6. Report telephone trouble to switchboard.

Tips and Gifts—Tips and gifts from patients or visitors are not to be accepted. Soliciting of personal gifts or donations from patients, visitors or employees is prohibited.

Visitors For Employees—Employees are not permitted to receive visitors while on hospital duty.

Visitors For Patients—Employees are asked to remember that visitors to the hospital are frequently upset and unfamiliar with hospital regulations. Every effort should be made to help them find their way in the building and to explain courteously the various regulations whenever necessary.

Training—Preparation to perform a job is fundamentally the responsibility of the employee. The hospital will, however, provide training programs where feasible and supervisory counseling to assist employees in learning new skills and gaining further knowledge through which better performance can be achieved and eventual promotion realized. Employees will be granted time while on duty to attend appropriate in-service training programs related to their jobs. All training programs must be approved in advance by Administration.

RULES OF CONDUCT

Termination Policy

The following hospital conduct regulations represent some of the "common sense" rules that you, as an employee, must follow. Violation of any of these conduct rules will subject the offender to disciplinary action up to and including termination of employment.

A. Termination during probationary period

During the three months' probationary period if an employee decides to leave the hospital no advance notice is required. If the hospital decides to terminate an employee within this time we may do so with no advance notice.

B. Resignations

1. Resignation with notice—An employee who desires to terminate his service with Baptist Hospital shall submit a written resignation. Resignations shall be submitted at least fourteen (14) calendar days before the final working day.

Department Heads shall give at least four weeks (28 calendar days) notice due to the nature of their responsibilities. Failure of an employee when resigning to give proper notice as indicated above results in forfeiture of accrued vacation credit, sick leave credit, and any other benefits which may have accrued.

2. Resignation without notice (Quit)—When an employee leaves without notice or is absent three consecutive days without notification or without satisfactory reason, he forfeits accrued vacation credit, sick leave and other benefits which may have accrued.

C. Discharge

A supervisor may discharge an employee under his jurisdiction without prior approval for an act such as (but not limited to) the following:

1. Assault and battery (fighting).
2. Stealing.
3. Inability to properly perform work due to appearance of being under the influence of alcohol or drugs.
4. Using or possessing drugs or narcotics in any form either on or off the job—except in accordance with medical purposes.
5. Making false, vicious, or malicious statements about any employee, the hospital, or its patients.
6. Leaving your hospital job during duty hours without permission.
7. Willful violation of instructions, rules, or regulations.
8. Misusing or damaging hospital property.
9. Neglect of duty, loitering, sleeping on the job.
10. Smoking in areas where it is prohibited and dangerous.

11. Falsifying any records in the hospital. (Altering the time card in any manner, having the time card punched by another employee, or punching another employee's time card.)
12. Fraudulent statement on Employment Application.
13. Possessing dangerous weapons while on hospital premises.
14. Improper dress, immoral conduct or indecency.
15. Repeated tardiness.
16. Absent from work without proper authorization. (Failing to notify hospital when unable to work.)
17. Insorbordination (refusing assignments).
18. Any conduct which in the opinion of administration is not suitable for a Baptist Hospital employee.

No employee's discharge is final until such action has been approved and authorized by the President or his delegated representative.

A discharged employee will forfeit all accrued vacation, sick leave and any other benefits that may have accrued.

MISCELLANEOUS BENEFITS AND SERVICES

Cafeteria—The hospital cafeteria is available to all employees and is open for breakfast, lunch and dinner. Employees must wear name pin to receive special employee rate. Vending machines located adjacent to the cafeteria provide an excellent selection for snacks or light meals twenty-four (24) hours a day.

Credit Union—You are invited to become a member of the Baptist Hospital Credit Union where you can save regularly through payroll deduction or cash deposits. It is organized by and for its employees who want to save or who are in need of financial aid. Its location is Room 224, Mid-State Medical Center.

Lost and Found—A lost and found center is maintained by the Housekeeping Office, located in the basement of the Central Building. If you find an article, tag it to show location, date and finder and turn it in to the Housekeeping Office. All inquiries concerning lost articles should be directed to this office. The hospital does not assume responsibility for money or personal articles lost or stolen.

Parking Area—Ample parking spaces are available for employees and visitors on the east side of 20th Avenue, North, directly across from Emergency Pavilion and on the north side of Patterson Street. Employees may park in the hospital's parking lots at a reduced monthly rate. Payment will be made by payroll deduction upon receipt of written authorization by the employee. Also, parking is available at a daily rate.

You are not permitted to use the areas designated for physicians and tenants of the Mid-State Medical Center. Parking in restricted areas will result in your car being towed away at your expense.

Personnel Department—The Personnel Department provides a number of services, including:

Information about and help with:

(a) Employment and transfers

(b) Leave of absence

(c) Employee records—insurance and retirement

(d) Employee benefits

(e) Orientation

(f) Personnel policies and special problems

(g) Identification Pins and Cards

Be sure to notify the personnel department of any changes in records in above, such as new address and zip code, or new name due to marriage. This should be done to make sure you get promptly your paychecks, benefits, and withholding tax statements. Without up-to-date information it is also difficult to locate you or your family in emergencies.

Performance Evaluation—The hospital recognizes the desire of every employee to know and understand how well he is performing his duties. A regular system of appraisal is used through which the employee preiodically will be reviewed in terms of his actual performance. Such employees will be counseled about areas in which work improvements are desired. Each employee will be permitted to sign the appraisal—indicating his agreement or disagreement with his supervisor's impression. All such appraisals will be reviewed by the Personnel Director.

Pharmacy Service—Under proper identification, an employee may purchase prescriptions for medications and items stocked in the hospital pharmacy, 10:30 a.m. to 4:00 p.m., Monday through Friday. These items are sold to employees at hospital costs plus a nominal service charge. This service is extended to *all* hospital employees and members of their immediate families (spouse, children, parents and dependent persons living in household).

Security Guards—Full time security guards are on duty at the hospital around-the-clock to protect employees, patients and property. Do not hesitate to call the hospital switchboard (dial 0) operators and request security guard assistance whenever there may be a need.

Service Awards—Baptist Hospital believes that long and faithful service should be honored and recognized. Employee Service Award pins and certificates are presented usually during National Hospital Week in May recognizing the individuals on their 5th, 10th, 15th, 20th and 25th Anniversary of service with the hospital.

COMMUNICATIONS

Bulletin Boards—Employees should check hospital bulletin boards for any news, changes or upcoming events. When employee wishes to post a notice, he should submit request to Department Head who subsequently may get permission from Administration.

Hospital Newspaper—Approximately every quarter a copy of the newspaper, "On Call," is distributed to employees of Baptist Hospital. The publication reports on

matters of interest to all those in the hospital family. It is edited and published by the Public Relations Director and Staff. It would be helpful if employees would notify the Public Relations office of news concerning our publics.

Mailroom—All mail and messages are distributed through this center on the first floor of the Central Building. It is open from 8 a.m. to 4:30 p.m., Monday through Friday, and from 8 a.m. until noon on Saturday.

HELP IN SOLVING PERSONAL PROBLEMS

Pastoral Ministry—Pastoral ministry to patients and families is the primary responsibility of the Chaplain of Baptist Hospital. In addition to visits, the Department of Pastoral Services and Education, in cooperation with local clergymen, seeks to render spiritual help and counsel to personnel, students and other persons in need through its programs of worship, education and pastoral consultation. The hospital cooperates with all religious representatives wishing to attend their denomination's members who are patients in Baptist Hospital.

The hospital offers annually three Chaplain internships that are one year's duration.

Services are held every Wednesday in the Hospital Chapel (Central Building). All patients, visitors and personnel are invited to attend the noon day, fifteen minute worship that is televised on the hospital's closed circuit channel 10 system.

EMPLOYEE APPEAL PROCEDURE

Effective the 1st day of January, 1969, Baptist Hospital, in an effort to communicate more effectively with its employees, established an Employee Appeal Procedure.

Occasionally in the relationship of worker to worker, or worker to employer, dissatisfactions develop. Usually these are the results of a lack of understanding or a lack of sufficient information. However, before a problem can be solved, it must be expressed. Therefore, the following procedure is available to help you seek satisfactory solutions to your problems.

If you have completed the probationary period and believe you have a problem involving unjust treatment or unfair judgment by another employee, or your Supervisor, you may appeal for a solution subject to the procedure of Baptist Hospital's personnel policies in the following manner.

Appeal Procedure for Employees:

1. If you have a problem which in your belief requires the use of the Appeal Procedure you may make such appeal to your immediate Supervisor. Such grievance must be made within ten (10) days of its occurrence. Within three (3) days after being confronted verbally with the grievance your Supervisor should arrange for a conference. The majority of appeals can be solved at this level. If the solution is not forthcoming and you are not satisfied, the appeal is referred to your Department Head.

2. The second action is sought by your Department Head rather than your Supervisor. At this stage the appeal, the recommended solution by your Supervisor, and your indication of dissatisfaction with such suggested solution—all in written form—should be presented to your Department Head. If you so desire, the Personnel Director or his delegated representative will give aid to you in the formulation of the problem in written form. This second action has a time limitation of three (3) days, unless circumstances intervene which, in the opinion of the Personnel Director, would cause undue hardship on either party of the problem. If a solution is not provided to your satisfaction, the problem is referred to the Personnel Director.

3. The third action is the seeking of a solution by the Personnel Director working with you, your Supervisor, and Department Head.

   (a) If a solution is found:

The Personnel Director is to write a memorandum to you, your Department Head, Supervisor and state the solution.

(b) If a solution is not found:

The Personnel Director will aid you to place in written form the problem in more detail along with subsequent actions so that the problem may be referred to Administration.

(c) Time Limit:

The Personnel Director shall be allowed five (5) working days, not including the date the notice of previous action was received from your Department Head.

4. If you are not satisfied with previous steps, the matter is referred to the Executive Vice-President. The Executive Vice-President after studying the problem will within five (5) working days refer a solution to you, with duplicate copies going to the Personnel Director, Supervisor, Department Head, and Division Head.

5. The final action may be resorted to when the previous actions are not satisfactory to you. In this case the appeal is made to the President of the Hospital. The President with information furnished by you, and also by all supervisory or Administrative Personnel previously participating in this appeal procedure will within five (5) working days refer a solution to you with duplicate copies going to Personnel Director, Supervisor, Department Head, and Division Head. This solution will be considered final.

HISTORICALLY SPEAKING . . .

Baptist Hospital, Inc., has grown from just 80 beds to 600 beds and 64 bassinets . . . from a medical staff of only 200 men to more than 400 physicians . . . from a small unit to a two-block complex of ten buildings.

In fact, its additional surrounding property makes it the largest general hospital in Metropolitan Nashville.

The hospital sprouted from a seed idea encompassing the need for Christian service to the community and was nurtured from the Protestant Hospital. Ownership was officially transferred April 21, 1948, to the Tennessee Baptist Convention that elects its governing body of 27 Trustees.

Baptist Hospital is in its second quarter century of service to God, our community and its citizenry. The harvest of Baptist Hospital's labor are bountifully gratifying for it has ministered to thousands of persons seeking to ease their suffering, to prevent pain, or to gain a promise of better health for the future.

The hospital has by birth a rich heritage, a life of dedicated service, and a future of hope to carry out the ministry of the Master.

What lies ahead? None of us know for certain, but it is hopeful that the Baptist Hospial's entire "family" will work together in its reaching to greater heights and wider horizons of health care.

ACCREDITATION

Baptist Hospital

is approved by:

The Joint Commission on Accreditation of Hospitals

is a member of:

The American Hospital Association

The Tennessee Hospital Association

is licensed by:

The Tennessee Department of Public Health

is certified by:

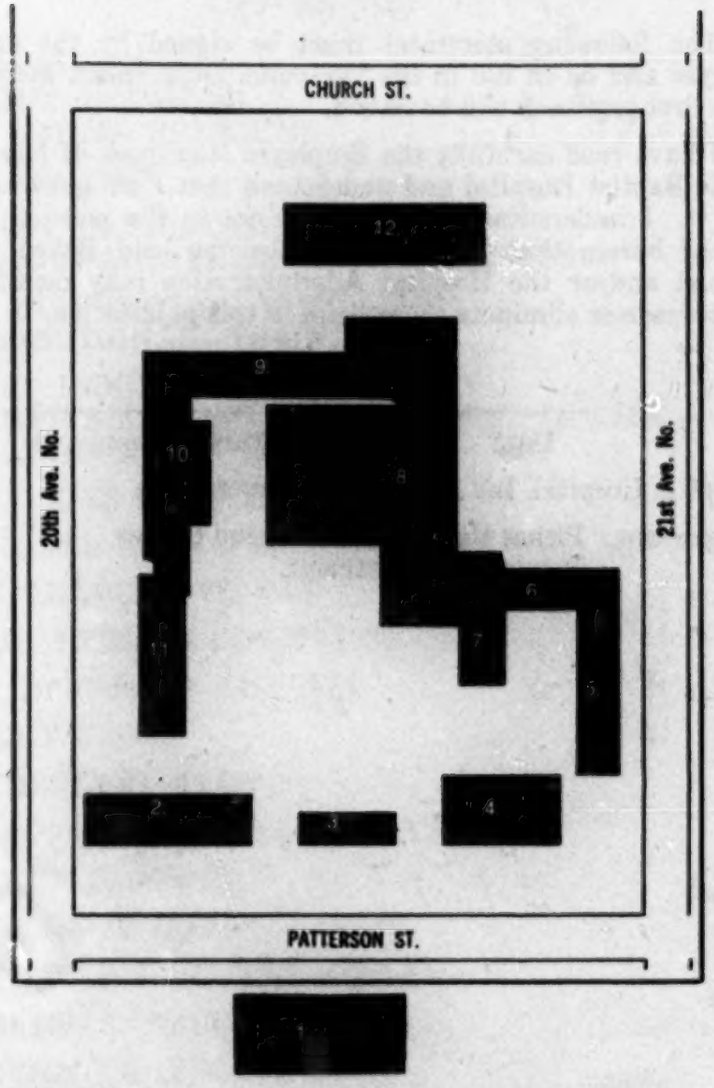
The Department of Health, Education and Welfare
for participation in Medicare.

Baptist Hospital, Inc. is owned and operated by the Tennessee Baptist Convention and is governed by a 27-man Board of Trustees.

". . . Well done, thou good and faithful servant: thou hast been faithful over a few things, I will make thee ruler over many things: enter thou into the joy of thy Lord . . . Verily, I say unto you, inasmuch as ye have done it unto one of the least of these my brethren, yee have done it unto me."

Matthew 25: 21, 40.

GUIDE TO BAPTIST HOSPITAL



1. Laundry
2. Steam Plant
3. Intern Apts.
4. Bulk Storage
5. West Building
6. Parlors
7. Auditorium
8. Central Building
9. South Building
10. East Building
11. Ford Annex & Emergency Pavilion
12. Mid-State Med. Center

EMPLOYEE STATEMENT

The following statement must be signed by the employee and be on file in the Personnel Department before the first paycheck will be issued.

I have read carefully the Employee Handbook of Nashville Baptist Hospital and understand that I am governed by it. I understand that any changes in the policies as listed herein that may be made by the said Board of Trust and/or the Hospital Administration may modify, supersede or eliminate the policies in this publication.

_____ _____

Date Signature of Employee

Baptist Hospital, Inc., Nashville, Tennessee.

Important: Please sign, detach and send to the Personnel Department.

EMPLOYMENT AT BAPTIST HOSPITAL OFFERS YOU

GOOD SALARY
  SHIFT PREMIUMS
  OVERTIME PREMIUMS

JOB SECURITY

SALARY INCREASES
  MERIT—ANNIVERSARY—PROMOTIONAL

ADVANCEMENT OPPORTUNITIES
  PROMOTIONAL—TRAINING

GROUP INSURANCE COVERAGE
  HOSPITALIZATION—MAJOR MEDICAL—LIFE—DISABILITY

VACATIONS WITH PAY

HOLIDAYS WITH PAY

SICK LEAVE WITH PAY

GOOD WORKING CONDITIONS

TAX DEFERRED ANNUITY

CREDIT UNION

RETIREMENT PLAN

PERSONAL LEAVE ALLOWANCE

SAFETY PROGRAM

WORKMAN'S COMPENSATION

EMPLOYEE DISCOUNT—PHARMACY

PARKING DISCOUNT

SERVICE TO COMMUNITY

SUPREME COURT OF THE UNITED STATES

No. 78-223

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BAPTIST HOSPITAL, INC.

ORDER ALLOWING CERTIORARI. Filed January 8, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 286430 312

Supreme Court, U. S.
FILED
OCT 26 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-223

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

BAPTIST HOSPITAL, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-223

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

BAPTIST HOSPITAL, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

Baptist Hospital, Inc. files this its Brief in Opposition to the National Labor Relations Board's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.[1]

[1] The opinion of the Court of Appeals for the Sixth Circuit is reported at 576 F2d 107 (1978). For convenience, the Petitioner National Labor Relations Board, is hereinafter referred to as the "Board"; and the Respondent, Baptist Hospital, Inc., is hereinafter also referred to as the "Hospital". References to the record in this case are made to the appendix in the Court of Appeals below, hereinafter referred to as the "Appendix", followed by the page number of this Appendix containing the referenced portion of the record.

QUESTION PRESENTED

Whether the Court of Appeals for the Sixth Circuit erred in concluding on the basis of the record before it that substantial evidence failed to support the Board's finding that Baptist Hospital's no-solicitation rule prohibiting employees from soliciting other employees for any purpose during non-working time in areas of the Hospital which are accessible to patients and their visitors violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1).

REASONS FOR DENYING THE WRIT

As accurately recounted in the Board's Brief in support of its Petition, the instant case closely resembles *Beth Israel Hospital v. National Labor Relations Board*, 93 S.Ct. 2463 (1978), in which this Court affirmed the First Circuit Court of Appeals' decision enforcing a Board order finding Beth Israel Hospital's similar[2] no-solicitation rule violative of Section 8(a)(1) of the National Labor Relations Act. *See NLRB v. Beth Israel Hospital*, 554 F2d 477 (1st Cir. 1977). *Accord, Lutheran Hospital of Milwaukee, Inc. v. NLRB*, 564 F2d 208 (7th Cir. 1977), *vacated and remanded*, No. 77-1289, June 26, 1978. *Contra, St. John's Hospital & School of Nursing, Inc. v. NLRB*, 557 F2d 1368 (10th Cir. 1977); *Baylor University Medical Center v. NLRB*, 578 F2d 351 (D.C. Cir. 1978), *petition for cert. filed*, No. 78-80, July 13, 1978. In his opinion for the Court in *Beth Israel* Mr. Justice Brennan carefully emphasized, however, that the Court was limiting its decision to the particular record before it and that it was in no way sanctioning perfunctory, a priori analysis by the Board in other hospital no-solicitation rule cases. The Court's opinion concludes:

> "We therefore hold that the Board's general approach requiring health-care facilities to permit employee solicitation and distribution during nonworking time and nonworking areas, *where the facility has not justified the prohibitions as*

---

[2] Unlike *Beth Israel*, however, where only that portion of the hospital's no-solicitation rule prohibiting employees from soliciting other employees even during non-working time *in the hospital's eating facilities* was before the Court, in the instant case Baptist Hospital's full no-solicitation rule banning employees from soliciting other employees in *any* area of the Hospital which is accessible to patients or their visitors including such areas as corridors, elevators, lobbies, gift shop, as well as public cafeteria, etc. is squarely before the Court. The Board's argument in its Petition that this case should be remanded to the Court of Appeals for "reconsideration" in light of the Court's *narrower* decision in *Beth Israel* is therefore inapposite.

necessary to avoid disruption of health care operations or disturbance of patients, is consistent with the Act. We hold further that, with respect to the application of that principle to petitioner's cafeteria, the Board was appropriately sensitive to the importance of petitioner's interest in maintaining a tranquil environment for patients. . . . The Court of Appeals did note, however, that the Board's guidelines are still in flux and are far from self-defining, concluding and *we agree, that*:

> 'The Board [bears] a heavy continuing responsibility to review its policies concerning organizational activity in various parts of hospitas. Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial setting with which the Board is more familiar. The Board should stand ready to revise its rulings if future experience demonstrates that the well-being of patients is in fact jeopardized.' " (Emphasis added)
>
> 93 S.Ct. at 2477.

The concurring opinions of Mr. Justice Powell (joined by Mr. Chief Justice Burger and Mr. Justice Rehnquist) and Mr. Justice Blackman (joined by Mr. Chief Justice Burger and Mr. Justice Rehnquist) also clearly emphasize the narrowness of the Court's holding as based upon unique circumstances at Beth Israel Hospital. 93 S.Ct. 2477-2482. Baptist Hospital respectfully submits that as supported in the record below the instant case is manifestly distinguishable from *Beth Israel* and the Board's summary reliance upon *Beth Israel* as the basis for the instant Petition is therefore misplaced. The Hospital further submits that based on the record before it the instant case was correctly decided by the Court of Appeals for the Sixth Circuit with full consideration of the identical factors outlined by the Court in *Beth Israel*. The Hospital respectfully urges, therefore, that no

purpose would be served by granting certiorari in the instant case.

Among the many significant differences distinguishing this case from *Beth Israel* is the fact that the cafeteria in Baptist Hospital is a far more typical "public" cafeteria routinely utilized by employees, patients, and their visitors alike. Unlike *Beth Israel* there is no evidence in the instant record suggesting that as few as 1.56% of the cafeteria's patrons are patients while only an additional 9% are visitors. These statistics were characterized as being of "critical significance" by Mr. Justice Brennan in his opinion for the Court in *Beth Israel* (98 S.Ct. at 2474) and are wholly lacking in the Board's evidence in this case. While there is no comparable statisical evidence available in the case *sub judice* the evidence which *was* introduced included expert medical testimony emphasizing the Hospital's policy of encouraging controlled mobility among the patients at the Hospital thereby suggesting a greatly different pattern of cafeteria utilization at Baptist Hospital. Appendix pp. 353-356, 367-369. Further distinguishing the cafeteria situation at Baptist Hospital is the fact that there was no comparable evidence in this case suggesting that the Hospital's cafeteria constitutes the normal "gathering area" for the Hospital's employees. Indeed, unlike *Beth Israel* where the Court accepted the Administrative Law Judge's finding that there were "relatively few places" where employees could congregate or meet on hospital grounds or in the nearby vicinity for the purpose of discussing non-work related matters (98 S.Ct. at 2468), the Sixth Circuit expressly found that Baptist Hospital still has a "large number" of areas including several employee lounges, some twenty-eight utility rooms and twenty-six nurses stations which are closed to patients and the public where its no-solicitation rule does not apply. 576 F2d at 108, 111. The Court below aptly noted that there was uncontradicted testimony in the instant record indicating that employees have openly solicited for a union in these areas without interference by the Hospital. 576 F2d at 108.

Additional factors distinguish the record in the instant case. In *Beth Israel* the Court emphasized how the hospital had ignored its asserted fears and utilized its cafeteria for other types of solicitation unrelated to unionization. 98 S.Ct. at 2468. There is no such showing in the instant record. Similarly, in *Beth Israel* the Court noted evidence indicating that the hospital had at one time tolerated employee solicitation in its cafeteria without any documented disturbances. 98 S.Ct. at 2474. In the instant case the record includes uncontradicted testimony by one of General Counsel's own witnesses acknowledging that his union solicitation had already resulted in untoward incidents involving open expression of hostility between employees for and against a union. Appendix pp. 396-400. The Court in *Beth Israel* also noted that there was evidence indicating that the hospital had previously confined its concern that patients might overhear employee cafeteria conversation to simply cautioning its staff to lower their voices rather than eliminating such conversation altogether. 98 S.Ct. at 2474, footnote 20. In the instant case the record not only fails to include any similar showing but the evidence is undisputed that Baptist Hospital further substantiated the sincerity of its concern that patients might be exposed to the disconcerting themes of union solicitation by also prohibiting its management staff from engaging in anti-union conversations in these same areas of the Hospital where they might be overheard by patients or their visitors. Appendix pp. 165-166.

Finally, and perhaps most importantly, contrary to *Beth Israel* where the hospital offered no affirmative evidence substantiating the necessity for its no-solicitation rule, the record in the instant case includes highly pertinent and wholly uncontradicted expert testimony supporting the medical necessity for Baptist Hospital's no-solicitation rule. As summarized in the Sixth Circuit's decision:

> "Two members of the medical staff of the hospital testified. Both were experienced physicians and engaged in private practice. Dr. Russel T. Birmingham testified that it was important to shield patients from emotional problems because the attitude of a patient and the patient's family have 'a great deal to do with recovery' of the patient. The witness stated that the need to maintain a tranquil atmosphere is not limited to treatment areas, since patients are permitted to move around in all areas of the hospital. If the union activity should become 'volatile or hostile in any form' it was Dr. Birmingham's opinion that such activity would have a potential for affecting patients and their families adversely.
>
> Dr. Greer Ricketson testified that any 'non professional attitude' among hospital employees is upsetting to patients. He stated that patients and their families are disturbed when people who are supposed to be taking care of them seem to have their minds on other things. The witness, who was chief of the medical staff of the hospital at the time of the hearing, stated emphatically that the rule and the reasons for the rule apply equally to all solicitations. Explaining the need for a rule which covers the entire working and public access area of the hospital, Dr. Ricketson referred to the present-day mobility of patients and the fact that an event which disturbs the visiting family invariably gets back to the patient.
>
> *No evidence was introduced which contradicted in any way the testimony of the two doctors that important medical reasons exist for maintaining the no-solicitation rule of the hospital.*" (Emphasis added)
>
> 576 F2d at 108-109.

It is submitted, therefore, that even accepting the Board's premise in the instant case that the Court's decision in *Beth Israel* requires a hospital to justify a no-solicitation rule extending beyond "immediate patient care areas" of a hospital, this totally unrebutted expert medical testimony not found in

the record of *Beth Israel* clearly satisfies this burden in the instant case.

In summary, in opposing the instant Petition for Certiorari Baptist Hospital emphasizes both the narrowness of the Court's prior decision and the numerous differences which distinguish the instant case from *Beth Israel*. The Hospital respectfully submits that the Court of Appeals for the Sixth Circuit gave proper consideration to the identical factors found relevant in *Beth Israel* and on the record before it properly concluded that substantial evidence failed to support the Board's conclusion that Baptist Hospital had not justified its no-solicitation rule. Quoting once more from Mr. Justice Brennan's opinion for the Court in *Beth Israel*:

> "Insofar as petitioner's challenge is to the substantiality of the evidence supporting the Board's conclusions, this Court's review is of course limited.
>
> > '*Whether on the record as a whole there is substantial evidence to support agency findings is a question Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance where the standard appears to have been misapprehended or grossly misapplied.*' Universal Camera Corp. v. NLRB, 340 U.S. 474, 491, 95 L.Ed. 456, 71 S.Ct. 456 (1951)." (Emphasis added)
>
> 98 S.Ct. at 1471.

Baptist Hospital respectfully submits that in light of these highly significant differences in the evidence in this case and *Beth Israel* the two cases are both distinguishable and fully reconcilable. The Hospital respectfully urges that just as in *Beth Israel* the Court should affirm the Court of Appeals' assessment of the substantiality of the evidence before it by denying the instant Petition.

CONCLUSION

For the foregoing reasons, Baptist Hospital respectfully submits that the Petition for a Writ of Certiorari should be denied as raising no issue warranting the Court's review.

Respectfully submitted,

BAPTIST HOSPITAL, INC.

FRED W. ELARBEE, JR.

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Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 78-223

Supreme Court of the United States

October Term, 1978

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BAPTIST HOSPITAL, INC.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

MOTION TO INTERVENE

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Supreme Court of the United States

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No. 78-223

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Petitioner,

v.

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

MOTION TO INTERVENE

Local 150-T, Service Employees International Union, AFL-CIO (hereinafter the "Union"), respectfully moves to intervene in this case on the side of the petitioner, National Labor Relations Board. In support of this motion the Union states as follows:

1. This aspect of the instant case is in every relevant particular identical to *Beth Israel Hospital* v. *NLRB*, No. 77-152.

Here as there the question presented is whether the Board properly concluded that a hospital violated § 8(a)(1) of the National Labor Relations Act by issuing and maintaining a rule that broadly prohibits employees from soliciting union support in the hospital. And, here as there, the Union as the charging party raised that question before the Board; when the Board, consistent with its uniform deci-

ions, found the violation charged, the Union believing this to be a routine case did not exercise its right to intervene in the court below; and, this Court's grant of certiorari establishes that the Union's assessment of the case was in that regard erroneous. The Union therefore seeks this opportunity to defend, as a party, its interests here.

2. An identical motion to intervene was granted over the employer's opposition in *Beth Israel.* 425 U.S. 940 (March 27, 1978). See also *NLRB* v. *Acme Industrial Co.,* 384 U.S. 925 (subsequently decided at 385 U.S. 421); *Banks* v. *Chicago Grain Trimmers,* 389 U.S. 813 (subsequently decided at 390 U.S. 459).

CONCLUSION

For the foregoing reasons this motion should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-223

National Labor Relations Board,

Petitioner,

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Baptist Hospital, Inc.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

OPPOSITION TO MOTION TO INTERVENE

COMES NOW Baptist Hospital, Inc., Respondent, in the above-styled and numbered case and files this its Opposition to the Motion of Local 150-T, Service Employees International Union, AFL-CIO (hereinafter referred to as the "Union") to intervene in this case. Respondent opposes said Motion for the following reasons:

1. Although, the Union in its Motion asserts that it seeks the opportunity to defend, as a party, its interest, nowhere in said Motion is it alleged or does it appear that the Union has any unique or special interest, which will not be properly and adequately represented by the National Labor Relations Board, Petitioner.

2. The Union does not show or allege any compelling interest in its own right apart from its interest in a class with all other labor unions which interest is not properly represented by the Petitioner. State of New Jersey v. State of New York, 345 U.S. 369 (1953).

3. The National Labor Relations Board is charged with responsibility by statute of representing the public interest including the interest of employees, unions and employers alike. The NLRB, Petitioner here, seeks review as a "public agent" and is completely capable and adequate to represent any interest the movant Union or any other Union may have in the issues involved in this case. Amalgamated Utility Workers v. Consolidated Edison Company of New York, 309 U.S. 261, 269 (February 26, 1940).

4. The Union failed to exercise its right to intervene in the court below and offers no acceptable or justifiable excuse for having failed to do so.

5. Any interest of the movant Union or any other Union in the issues involved herein, have been previously submitted to the court in Beth Israel Hospital v. NLRB, 425 U.S. 940 (March 27, 1978).

While the Union may have a general interest in rules relating to the solicitation of employees for union membership, it has no interest greater than or apart from other Unions, employees and employers in the same subject matter. The NLRB, Petitioner here, is charged with the responsibility and is presumed to represent the interest, not only of the Union moving to intervene, but of all other unions as well as the public interest in the issues involved herein. "The Board acts in a public capacity to give effect to the declared public policy of the Act... " National Licorice Company v. NLRB, 309 U.S. 350, 362 (March 4, 1940).

For all of the foregoing reasons, we submit that the Union's Motion to Intervene should be denied.

Respectfully submitted,

ELARBEE, CLARK & PAUL

By: Fred W. Elarbee, Jr.

Fred W. Elarbee, Jr.
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Respondent

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-223

National Labor Relations Board,

Petitioner,

v

Baptist Hospital, Inc.

Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of February, 1979, copies of the Opposition to Motion to Intervene were mailed air mail, postage prepaid, to the following:

Wade H. McCree, Jr.
Solicitor General
Department of Justice
Washington, D.C. 20530

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General Counsel
National Labor Relations Board
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George Kaufmann
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Washington, D.C. 20037

All parties required to be served have been served.

Fred W. Elarbee, Jr.

Fred W. Elarbee, Jr.
Counsel for Respondent

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February 14, 1979

Honorable Michael Rodak, Jr.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: NLRB v. Baptist Hospital, Inc.
No. 78-223

Dear Mr. Rodak:

In response to your telephone request, please be informed that the National Labor Relations Board does not oppose the motion of the charging party, Local 150-T, Service Employees International Union, AFL-CIO, to intervene in this case.

Sincerely,

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No. 78-223

In the Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BAPTIST HOSPITAL, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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The Hospital violated Section 8(a)(1) of the National Labor Relations Act by adopting and maintaining a rule that prohibits employees during non-working time from soliciting union support in all areas of the Hospital to which patients and visitors have access, without an adequate showing that such a ban was necessary to avoid disruption of patient care	14
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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 576 F.2d 107. The decision and order of the National Labor Relations Board (Pet. App. 15a-28a) is reported at 223 N.L.R.B. 344.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1978. The petition for a writ of certiorari

was filed on August 8, 1978, and granted on January 8, 1979 (A. 116). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.* are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *.
>
> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

QUESTION PRESENTED

Whether the respondent hospital violated Section 8(a)(1) of the National Labor Relations Act by adopting and maintaining a rule that prohibits employees from soliciting union support during nonworking time in any area of the hospital to which patients and visitors have access, without an adequate showing that such a ban was necessary to avoid disruption of patient care.

STATEMENT

A. The Board's Findings of Fact

Baptist Hospital, Inc. (hereafter "the Hospital") is a nonprofit general hospital,[1] located in Nashville, Tennessee. It has 600 patient beds and more than 1,800 employees (Pet. App. 2a, 30a; A. 24).

For a number of years prior to October 1974, the Hospital maintained a rule which prohibited solicitation on the premises without the Hospital's written approval (Pet. App. 32a-33a; A. 102).[2] In August

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[1] The National Labor Relations Act was amended, effective August 25, 1974, to extend its coverage to nonprofit health care institutions. 88 Stat. 395 (29 U.S.C. 152(14)).

[2] The rule read:

> In order to protect employees from any form of solicitation, raffle, charity drives, etc., it is strictly prohibited for anyone to solicit patients or visitors while on hospital premises without written approval of the Administration. Violation of this policy will subject employee to discipilinary action. Employees who discover persons making unauthorized solicitation should report this immediately to their Supervisor.

The rule was contained in an employee handbook, entitled "Inside Baptist Hospital," which also sets forth other rules and policies governing employee conduct. The Handbook's "Rules and Responsibilities" section urges employees "to refrain from loud talking * * * and any other activity that would be disturbing to the patient or out of place in a hospital." It also states that "[n]oise deters patient treatment and recovery * * *," that "[i]t is each employee's obligation to avoid unnecessary noise in the hospital," and that employees are to speak "in a quiet, pleasant tone * * *." In addition, the Handbook provides that an employee may be discharged for such offenses as fighting; willful violation of instructions,

1974, Local 150-T, Service Employees International Union, AFL-CIO (hereafter "the Union") began a campaign to organize the Hospital's employees, and, in October, the Hospital revised its rule restricting solicitation (Pet. App. 33a-34a, 66a; A. 3-6, 21-22).[3] This revised no-solicitation rule provides in relevant part (Pet. App. 34a, 66a-67a; A. 75):

> No solicitations of any kind, including solicitations for memberships or subscriptions, will be permitted by employees at any time, including work time and non-work time in any area of the Hospital which is accessible to or utilized by the public. Anyone who does so will be subject to disciplinary action. In those work areas of the Hospital not accessible to or utilized by the public, no solicitation of any kind, including solicitations for memberships or subscriptions will be permitted at any time by employees who are supposed to be working, or in such a way as to interfere with the work of other employees who are supposed to be working.

Under this rule, the Hospital prohibits all employee solicitation, including distribution of union authorization cards, at any time in any area open to patients and visitors. Included in the public-access areas closed to such solicitation are the Hospital's gift shop, cafeteria, lobbies, public restrooms, entrances, the sidewalks leading to the entrances, and the parking lot across the street from the Hospital. (Pet. App. 35a, 37a; A. 8, 9-10, 11-16, 34.)[4] Except for the emergency room entrances, the Hospital does not regard these areas as patient-care or treatment areas (Pet. App. 35a, 37a; A. 10-16, 31-32). While patients may visit these non-patient care areas—particularly the cafeteria, gift shop, and lobbies—if they are sufficiently well, they need special permission to leave their floors. (Pet. App. 35a; A. 11, 12, 13, 27, 41, 50, 54-55, 64.)[5]

The gift shop and cafeteria are open to the general public without restriction and are located on the first

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rules, or regulations; neglect of duty; loitering; leaving one's job during duty hours without permission; or "[a]ny conduct which in the opinion of administration is not suitable for a Baptist Hospital employee." (Pet. App. 64a-66a, 75a; A. 98-100, 104-105.)

[3] According to W. T. Victory, the Hospital's vice-president of personnel services, the original rule was intended primarily to keep salesmen out of the Hospital, while the new rule was designed to control the conduct of employees. The change in the rule was prompted by the Union's organizing activity on the premises (Pet. App. 33a-34a, 66a, 71a-73a; A. 5-6, 29-31). Victory stated that the change was made after consultation with the Hospital's counsel; no physicians were consulted to determine whether there was a medical basis for the revision (Pet. App. 33a-34a, 71a-72a; A. 21-22, 72-73).

[4] The record shows that there is one lobby on the 21st Avenue side of the Hospital and a smaller lobby on the other side (20th Avenue) (A. 13, 113). The Hospital's primary entrances are the emergency room entrances, the 21st Avenue entrance, and the 20th Avenue entrance. These entrances are open to both the public and the employees; there is no distinction as to who can use them. (A. 14-15, 113.) Public restrooms are scattered throughout the Hospital on various floors; they are not normally utilized by patients (A. 14).

[5] Patients may visit with their children in these areas, since young children are not permitted in patients' rooms (A. 27, 54).

floor of the Hospital's central or main building (Pet. App. 35a; A. 11-12).[6] The cafeteria, which has a seating capacity of approximately 150, is considered by the Hospital to be an area where employees and the general public may eat and relax (Pet. App. 35a; A. 11-12, 105). According to Dr. Greer Ricketson, chief of the Hospital's medical staff, "a small percentage" of patients eat in the cafeteria; special permission is required for them to do so (Pet. App. 35a; A. 64). The only employees who actually work in the cafeteria are dietary department personnel, who work in the kitchen and on the cafeteria serving line. Other employees frequent the cafeteria for meals or break periods. (Pet. App. 35a-36a; A. 12, 13, 49, 51, 71.) While three meals are served daily at specified hours on the serving line (A. 37), the cafeteria is open at all times, and food may be purchased from vending machines in an adjacent area when the serving line is closed (Pet. App. 36a; A. 37-38, 49, 51). There are other areas in the Hospital where employees may purchase food from vending machines, but the cafeteria is the only place where hot food may be pur-

[6] A layout of the Hospital's various buildings has been reproduced on page 113 of the Appendix. The Central Building, the South Building, and the East Building, to which the Ford Annex and Emergency Pavillion are attached, are the Hospital's primary patient care buildings (A. 18, 35-36). Patients are not regularly found on the first floor of these buildings, except in the admitting office, the emergency room, and the adjacent "short stay" unit, which are all located in the East Building and the adjacent Ford Annex (A. 13, 20, 28-29, 35-36).

chased by employees and others (Pet. App. 36a; A. 8, 16-17, 26, 105).[7]

Under the Hospital's revised rule, employee solicitation is permitted during nonworking time in areas closed to the public, including utility rooms, nurses' stations, and employee lounges and restrooms (Pet. App. 36a; A. 8-9, 18-19, 24-36, 63).[8] There are two employee lounges; both are equipped with food vending machines, tables, and chairs (Pet. App. 36a; A. 8, 16-17, 26). One such area, with a seating capacity of 50, is located in the Hospital's laundry building, some distance from the primary patient care build-

[7] Victory testified that the Hospital did a study of cafeteria use, at the request of its counsel, which showed that on a week day about 32 percent of the people using the cafeteria serving line during meal periods were nonemployees and that on a weekend 53 percent were nonemployees (A. 27, 36-37). Victory explained that this study was based on a count of individuals wearing employee identification pins who went through the serving line. He added that he did not know how long the study ran, that it was limited to use of the serving lines during meal periods, and that it did not include people who brought their own lunch into the cafeteria, used the vending machines, or merely sat and talked. (A. 36-38.)

[8] There are 28 utility rooms and 26 nurses' stations at the Hospital. The utility rooms are adjacent to the nurses' stations; they are used for storage of materials and sometimes contain coffee machines. (A. 17-18, 25-26.) The Hospital regards the utility rooms as both work and relief areas for the employees (A. 18). The nurses' stations, generally located on each floor of the Hospital, are shut off from the public by glass partitions. Patient records are kept at these stations and consultations between physicians and various other individuals responsible for patient care take place at these stations, which are regarded as work areas by the Hospital. (Pet. App. 36a n.3; A. 8, 18-19, 25-26.)

ings and separated from them by a thoroughfare, Patterson Street (A. 113). This lounge is not readily accessible during breaks to the employees who work in the main part of the Hospital. (Pet. App. 36a; A. 16-17, 49-50, 113.) The other employee lounge is small, with room for only 25 to 30 employees. It is located on the fourth floor surgery area of the Hospital's Central Building, and is used for the most part only as a relief area for those individuals whose duties require their presence in that area. (Pet. App. 36a-37a; A. 17, 26.)[9]

Clyde French, a part-time nursing assistant or orderly at the Hospital, was active in the Union's organizing activities. During the first three weeks of September 1974, prior to revision of the Hospital's no-solicitation rule, he distributed handbills and solicited employees to sign union authorization cards. French carried out this activity on his break periods and before and after work in such areas as the cafeteria, employee lounges, lockerrooms, and the sidewalks outside the Hospital. (Pet. App. 17a, 40a; A. 46-47, 65-66, 68-69.) French testified that he engaged in most of his union solicitation in the cafeteria because that was where most employees took their breaks and ate (A. 49-51, 71). After French began his organizational activities, the Hospital decreased the amount of work offered to him (Pet. App. 41a-54a, 19a-20a), and on January 30, 1975, ejected him from the cafeteria where he was conversing with a fellow employee, ostensibly because he was not on duty (Pet. App. 62a-63a).

[9] The Hospital also has a parking lot located across the street from the main entrance on 20th Avenue. This parking lot is open to the general public as well as employees, and Victory originally testified that solicitation was prohibited in the parking lot because of its use by the public. (Pet. App. 35a, 37a; A. 15-16.) However, Victory later testified that employee solicitation would be permitted in the parking lot as long as there was no litter or nuisance problem (A. 34). The Hospital's medical witnesses stated that such activity in the parking lot would not be detrimental to patient care (A. 45, 63).

B. The Board's Decision

The Board, adopting the findings of its administrative law judge, concluded that the revised no-solicitation rule violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), to the extent that it "prohibits employees from soliciting for the Union during their nonwork time in areas of the hospital other than immediate patient care areas" (Pet. App. 22a).[10] In so doing, the Board followed its decision in *St. John's Hospital and School of Nursing, Inc.*, 222 N.L.R.B. 1150 (1976) (Pet. App. 16a n.2). It there held that,

[10] The Board also upheld the administrative law judge's finding that the Hospital violated Section 8(a)(3) and (1) of the Act by reprimanding French and refusing work assignments to him because of his union activities (Pet. App. 16a-20a, 23a, 89a, 85a, 81a). Moreover, the Board, in disagreement with the administrative law judge, found that the Hospital further violated Section 8(a)(1) of the Act by ejecting French from the cafeteria (Pet. App. 16a, 88a). The court of appeals sustained the Board's findings concerning discriminatory treatment of French except to the extent that they were predicated on the finding that the no-solictation rule was invalid (Pet. App. 11a-12a). No issue as to the findings respecting French is raised here.

while a hospital may lawfully ban employee solicitation, even during nonworking time, in immediate patient care areas such as the patients' rooms, operating rooms, and places where patients receive treatment, a ban on that activity in other areas to which patients and visitors have access is invalid, absent a showing by the hospital that such a ban is necessary to avoid disruption of patient care.[11] The Board found that the Hospital had not made that showing here.

Specifically, the administrative law judge noted that the Hospital's two medical experts, in response to "the hypothetical question * * * whether a discussion concerning a union could affect a patient in a deleterious manner," answered that, "if the discussion were to become volatile or hostile in any form, the discussion could definitely have the potential for adversely affecting the patient and the patient's family" (Pet. App. 68a). But there was no evidence that the union activity of the Hospital's employees was of such a nature. Moreover, the administrative law judge concluded (Pet. App. 75a, footnote omitted):

> [T]here are other sections of the Respondent's "Employee Handbook," which would, or could, be utilized by the Respondent to discipline an employee engaged in union solicitation who does not otherwise conform to the rules of employee conduct. Thus, there exist, without the necessity to prohibit all union solicitation anywhere on the Respondent's premises on nonwork time, rules which prohibit unruly conduct by any employee, including one engaging in otherwise lawful union solicitation.

[11] Literature distribution may be banned in all working areas. See *Stoddard-Quick Mfg. Co.*, 138 N.L.R.B. 615 (1962).

The Board ordered the Hospital to rescind its revised no-solicitation rule and to cease and desist from promulgating, maintaining in effect, enforcing, or applying any rule "prohibiting its employees from soliciting on behalf of any labor organization during their nonworking time in any area of [the Hospital] other than immediate patient care areas" (Pet. App. 23a-24a, 90a).

C. The Court of Appeals Decision

The court of appeals denied enforcement of the Board's order respecting the no-solicitation rule. The court found that the testimony of the two physicians and the hospital administrator as to the necessity of creating and maintaining a tranquil atmosphere throughout the hospital for patients and visitors was sufficient to establish "special circumstances" that warranted the Hospital's proscription of employee solicitation in all areas accessible to patients and visitors, including the Hospital cafeteria (Pet. App. 7a-8a, 10a).[12]

[12] However, the court held that a ban on solicitation in the parking lot was not justified (Pet. App. 10a-11a):

> Both medical witnesses stated that person-to-person solicitation and distribution of literature in the parking lot should have no detrimental effect on patients within the hospital. Vice-President Victory agreed that solicitation and distribution in the parking lot would not be objectionable so long as the premises were not littered and

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Beth Israel Hospital* v. *NLRB*, No. 77-152 (June 22, 1978), slip op. 23, this Court held "that the Board's general approach of requiring health-care facilities to permit employee solicitation and distribution during nonworking time in nonworking areas, where the facility has not justified the prohibitions as necessary to avoid disruption of health care operations or disturbance of patients, is consistent with the Act." The Court added that, in order to justify a rule prohibiting such activity in those areas, the institution must present "evidence of a substantial threat of harm to patients" (slip op. 15). The Court went on to find that the Board had reasonably applied that principle in concluding that the hospital there had violated the Act by barring employee solicitation and distribution in a hospital cafeteria used primarily by employees, but also by patients and visitors.

The Court pointed out that "patient use of the cafeteria, is voluntary, random, and infrequent" (slip op. 17);[18] that "[p]atients who frequent the cafeteria would not expect to receive special attention or pri-

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solicitation did not "create a nuisance." Other rules not in issue here provide the means for preventing noisy mass meetings and littering of the premises. Accordingly, in denying enforcement of the Board's order we construe the hospital's no-solicitation, no-distribution rule to apply only to areas within the various buildings occupied by the hospital and those exterior areas immediately adjacent to entrances used by patients and the public.

[18] The Court noted that "only 1.56% of the cafeteria's patrons are patients" (slip op. 18).

mary care there and any unusually sensitive to seeing union literature distributed or overhearing discussions about unionism, readily could avoid the cafeteria without interfering with the hospital's program of care"; and that the hospital had earlier permitted "limited union solicitation in the cafeteria for a significant period, apparently without untoward effects" (slip op. 18). The Court also noted that the hospital had "permitted use of the cafeteria for other types of solicitation, including fund drives," thereby indicating that it not only "regarded the cafeteria as sufficiently commodious to admit solicitation and distribution without disruption" (slip op. 18-19, footnote omitted), but also recognized that "the cafeteria is a natural gathering place for employees on nonworking time" (slip op. 5).

While the present case involves other patient access areas as well as the hospital cafeteria, under the principles enunciated in *Beth Israel* the Board's finding that the Hospital violated Section 8(a)(1) of the Act by barring employee solicitation in all such areas should be sustained. The Hospital's broad ban closes to employee solicitation areas which, like the cafeteria in *Beth Israel*, are not devoted essentially to patient care, and where the likelihood of disrupting such care is remote. The Hospital did not sustain its burden of establishing that such a broad ban on employee solicitation was nonetheless necessary to maintain proper patient care.

ARGUMENT

THE HOSPITAL VIOLATED SECTION 8(a)(1) OF THE NATIONAL LABOR RELATIONS ACT BY ADOPTING AND MAINTAINING A RULE THAT PROHIBITS EMPLOYEES DURING NON-WORKING TIME FROM SOLICITING UNION SUPPORT IN ALL AREAS OF THE HOSPITAL TO WHICH PATIENTS AND VISITORS HAVE ACCESS, WITHOUT AN ADEQUATE SHOWING THAT SUCH A BAN WAS NECESSARY TO AVOID DISRUPTION OF PATIENT CARE

A. The Hospital's No-Solicitation Rule Is Too Broad

The Hospital's rule bars employee solicitation, not only in areas that are devoted primarily to patient care, such as patient's rooms, operating rooms, and x-ray and therapy facilities, but also in such public areas accessible to patients and visitors as its cafeteria, gift shop, public restrooms, lobbies, entrances, and sidewalks. The latter areas the Hospital, itself, does not consider to be patient care or work areas,[14] and the likelihood that employee solicitation therein would disrupt patient care or treatment is remote.

Since these areas are open to the public generally, patients who frequent them are likely to be exposed to conduct and conversations "at least as disquieting to [them] as union solicitation * * *." *Beth Israel Hospital* v. *NLRB*, No. 77-152 (June 22, 1978), slip op. 18 n.20. Moreover, patient use of these public areas is voluntary and random. As in *Beth Israel*,

[14] Hospital Vice-President Victory testified that the cafeteria, gift shop, lobbies, entrances (other than the emergency room entrance) and sidewalks were not "work areas," which he defined as areas where patients receive care or treatment (A. 10-11, 12-13).

patients frequenting these areas reasonably expect that routine daily discourse will occur there, and any patients unusually sensitive to union organizational activities can avoid such areas without affecting their hospital treatment (slip op. 18).[15] Finally, since patients may visit these areas only with special permission (A. 54, 64), those whose well-being requires the absence of distracting or possibly upsetting stimuli would presumably not be permitted to go there.

B. The Hospital Did Not Demonstrate Special Circumstances Justifying Its Broad No-Solicitation Rule

The Hospital sought to sustain its burden of establishing that a ban on employee solicitation in all

[15] The Hospital contends that its cafeteria is distinguishable from that in *Beth Israel*, since "there is no evidence in the instant record suggesting that as few as 1.56% of the cafeteria's patrons are patients while only an additional 9% are visitors" (Br. in Opp. 5). However, while the Court's opinion in *Beth Israel* did deem it of "critical significance that only 1.56% of the cafeteria's patrons are patients" (slip op. 17-18), the legal standards enunciated in that decision are not narrowly statistical, and certainly are not limited to hospital cafeterias with no more than precisely that percentage of patient usage (slip op. 23). Employee usage of the cafeteria here was substantially similar to that in *Beth Israel*. There, 77% of the cafeteria's patrons were employees (slip op. 5), whereas here the employee usage during meal service was 68% on weekdays and 47% on weekends (A. 27, 36-37).

Nor can *Beth Israel* be distinguished on the ground that "there was no comparable evidence in this case suggesting that the Hospital's cafeteria constitutes the normal 'gathering area' for the Hospital's employees" (Br. in Opp. 5). Vice-President Victory admitted that the cafeteria is considered an area where employees and the general public may eat and relax (Pet. App. 36a; A. 12).

public areas of the hospital was justified by presenting the testimony of two members of its medical staff, Drs. Birmingham and Ricketson.[16] Dr. Birmingham testified that it was important to shield patients from emotional problems because the attitude of a patient and the patient's family have "a great deal to do with the recovery" of the patient (A. 39-40). He further stated that the need to maintain a tranquil atmosphere is not limited to treatment areas, since patients are permitted to move around in all areas of the hospital (A. 41).

Similarly, Dr. Ricketson testified that any "nonprofessional attitude" among hospital employees is upsetting to patients. He stated that patients and their families are disturbed when people who are supposed to be taking care of them seem to have their minds on other things. (A. 57-58.) Dr. Ricketson justified a rule covering all the areas of the hospital to which the public has access by noting the mobility of patients, and the likelihood that an event which disturbs the visiting family will also affect the patient (A. 53-54).

When asked specifically about the impact on medical care if hospital employees were permitted to engage in union solicitation in the presence of patients,

[16] Vice-President Victory testified that he did not consult with any doctors, but only with his superiors and the Hospital's attorney, before promulgating the rule in question. Doctors were consulted about the rule only after charges had been filed with the Board attacking its validity. (A. 72-73.) Moreover, Victory conceded, on cross-examination, that solicitation or distribution in a non-working area would have little effect on patient care (A. 31-32).

Dr. Birmingham stated (A. 40): "I think if the discussion becomes volatile or hostile in any form, I think this very definitely would have the potential for adversely affecting the patients and the patient's families" (see also A. 41-42, 43). However, he added that in his opinion a normal conversation, such as one employee asking another to sign a union card, would not have an adverse effect on patients (A. 45). Similarly, although Dr. Ricketson responded affirmatively to the question whether a patient could be upset by overhearing a heated discussion between two nurses concerning the advantages and disadvantages of having a union and of the possibility of a strike if the Hospital did not meet union demands (A. 56-57), on cross-examination he acknowledged that an ordinary conversation between two employees in the cafeteria—"people sitting there and talking to each other"—would not be disturbing to patients, who would not be concerned about inattention to duty because they would assume that the employees were on a break (A. 62). He distinguished between "a one to one sort of thing" and a "group meeting" or where someone was "giving a speech" (A. 63-64). The doctors had no knowledge of any volatile or violent union solicitation occurring at the Hospital, nor were they aware of any patients who had been adversely affected by union solicitation (A. 44-46, 61, 64-65).[17]

[17] The record shows that union solicitation had taken place, at least on the part of employee French, in public areas of the Hospital, particularly in the cafeteria. In a 10-day period, he had solicited about 200 employees to sign union cards (A. 47, 51, 65-66).

The Board accepted the foregoing testimony, which was uncontradicted, but reasonably concluded that it was not sufficient to establish that a ban on all employee union solicitation in all public areas of the hospital was needed in order to avoid disruption of patient care.[19] The Hospital offered no evidence that union solicitation was inherently disturbing to patients or their families. Rather, the doctors testified that *any* volatile or hostile conversation could be disturbing (A. 41, 43, 57, 59-60). But as the administrative law judge, whose findings were adopted by the Board, pointed out (Pet. App. 75a-76a), there was no basis for believing that the union solicitation here would be conducted in such a manner.[19] Moreover, the Hospital has other rules which prohibit loud or disturbing conversations, which it apparently regards as adequate to prevent other "hostile and volatile" exchanges. No reason was offered why these rules would not be adequate to keep union-related conversations within appropriate bounds. As the Court noted in *Beth Israel*, *supra* (slip op. 18, n.20): "Evidence that [the Hospital] adopted a less

[19] As the Court noted in *Beth Israel*, "it is in the Board, not [the Hospital], that the 1974 amendments vested responsibility for developing [federal national labor relations] policy in the health-care industry. It is not surprising or unnatural that [the Hospital's] assessment of the need for a particular practice might over-compensate its goals, and give too little weight to employee organizational interests" (slip op. 16-17).

[19] Although two of the hundreds of employees solicited by employee French expressed hostility to the Union (Br. in Opp. 6; A. 66-68), these incidents did not create any type of disturbance (A. 72).

restrictive approach to behavior in the [public areas] which would be at least as disquieting to patients as union solicitation further supports the Board's conclusion that the risk of harm to patients is not so great as to justify an unlimited restriction."[20]

Similarly, the Hospital's concern that patients might be disturbed by observing staff devoting their attention to matters other than patient care is equally applicable to any personal conversation on the part of staff. The Hospital, however, has not seen fit to prohibit all such personal contacts by off-duty employees in public areas. The Hospital is entitled to prohibit union solicitation during working time, which it does. The Hospital made no showing that patients are likely to believe that off-duty employees conversing in such areas as the cafeteria, lobbies, or gift shop are actually on duty and therefore would be concerned that those staff members are neglecting patients' needs to pursue personal matters.

C. The Alternative Areas In The Hospital Were Not Adequate For The Effective Exercise Of The Employees' Organizational Rights

In *Beth Israel*, the Court indicated that, "[w]hile outside of the health care context, the availability of

[20] Dr. Ricketson appeared to be concerned about groups congregating to discuss union matters or to hear a speech, rather than "one-to-one" encounters (A. 63-64). Clearly the Hospital could prohibit such group activity without resorting to a complete ban on union solicitation. As the court of appeals stated in regard to solicitation in the parking lot, "[o]ther rules not in issue here provide the means for preventing noisy mass meetings and littering of the premises" (Pet. App. 11a).

alternative means of communication is not, with respect to employee organizational activity, a necessary inquiry, * * * it may be that the importance of the employer's interest here demands use of a more finely calibrated scale. For example, the availability of one part of a health-care facility for organizational activity might be regarded as a factor required to be considered in evaluating the permissibility of restrictions in other areas of the same facility" (slip op. 20-21). Usually, the question of alternative areas is not considered until the employer has sustained its burden of establishing that the conduct of employee union solicitation is likely to disrupt its operations, and, as shown, the Hospital has not done so here. "The place of work is a place uniquely appropriate for [the] dissemination of views concerning the bargaining representative * * *." *NLRB* v. *Magnavox Co.*, 415 U.S. 322, 325 (1974). The restriction of the employees' Section 7 activity to certain areas of the work place necessarily curtails that activity. Curtailment of a Section 7 right, no less than total abrogation thereof, interferes with and restrain its exercise and thus would be barred by Section 8(a)(1) of the Act unless justified by a compelling management interest,[21] *i.e.*, a showing that the conduct of

[21] With respect to employees " 'already rightfully on the employer's property,' " it is the " 'employer's management interests rather than [its] property interests' that primarily are implicated." *Eastex, Inc.* v. *NLRB*, No. 77-453 (June 22, 1978), slip op. 15, quoting from *Hudgens* v. *NLRB*, 424 U.S. 507, 521-522 n.10 (1976).

solicitation would be likely to interfere with the employer's operations.

However, even if alternatives must be considered when hospitals are involved, the alternatives to use of the Hospital's public areas were not adequate for the effective exercise of the employees' organizational rights. Thus, while there are two employee lounges where the Hospital permits employee solicitation, they are not easily accessible to most of the 1,800 employees. One is located in the laundry building, some distance from the rest of the Hospital, and it is not readily available to most employees during short relief periods. While open to the entire workforce, the other lounge is small and is used primarily by the employees working in the adjacent surgery area of the Hospital. (See pages 7-8, *supra*.) Although solicitation is permitted during non-working time in the Hospital's numerous nurses' stations and adjacent utility rooms, the record shows, that relatively few employees use these areas for their relief periods (A. 49, 51, 71). Unlike such "natural gathering areas" for the employees as the cafeteria, these locations are not "conducive" to solicitation; they are basically work areas for the employees found there.[22]

In sum, the Board reasonably concluded that the Hospital's rule barring employee solicitation in all public areas of the institution unduly interfered with

[22] Compare the finding in *Beth Israel* that the only areas available to employees for union solicitation and distribution were a few "separate and scattered locker areas" to many of which "only a fraction [of the employees] have access" (slip op. 5).

the employees' Section 7 organizational rights absent a showing by the Hospital that such a broad ban was necessary to avoid a disruption of patient care, and substantial evidence supports its finding that the Hospital did not sustain that burden.[23] Accordingly, the court of appeals erred in declining to enforce the Board's order. See *Beth Israel*, *supra* (slip op. 17).[24]

---

[23] The Board's decision does not preclude the Hospital from issuing a narrower rule which would preclude solicitation in *some* public areas that are not immediate patient care areas provided it can demonstrate that solicitation there would be likely to affect patient care. Cf. *NLRB* v. *Baylor University Medical Center*, No. 78-80 (Oct. 30, 1978).

[24] To the extent that the decision below was based on the court's perception that the 1974 health-care amendments expressed a congressional concern for preventing disruption in hospitals caused by union activity, "not limited to * * * [that] caused by strikes and picketing" (Pet. App. 9a), it is directly contrary to *Beth Israel*. In that case, the Court found it "significant that * * * Congress *did not* enact any special provision regarding solicitation and distribution in particular or disruption of patient care in general other than through strikes," and inferred, therefore, that "Congress was satisfied to rely on the Board to continue to exercise the responsibility to strike the appropriate balance between the interests of hospital employees, patients and employers" (slip op. 12-13, emphasis added).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL LABOR RELATIONS BOARD,
AND
Petitioner,
LOCAL 150-T SERVICE EMPLOYEES INTERNATIONAL UNION (AFL-CIO)
Intervenor,
v.
BAPTIST HOSPITAL, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE UNION

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BAPTIST HOSPITAL, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE UNION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 576 F.2d 107, and is reproduced at Pet. App. 1a-12a.* The decision and order of the National Labor Relations Board are reported at 223 NLRB 344 (Pet. App. 15a-93a).

JURISDICTION

The judgment and order of the Court of Appeals was entered on May 10, 1978. (Pet. App. 13a.) The Petition for a Writ of Certiorari was filed by the National Labor Relations Board on August 8, 1978 and granted on January 8, 1978. The jurisdiction of this Court is invoked under 28

*"Pet. App." refers to the Appendix to the Petition for Certiorari in this case. "A." refers to the record Appendix in this Court. "Tr." refers to the transcript of record before the Board.

U.S.C. § 1254(1). The motion to intervene was filed on Jan. 12, 1979 and was granted on March 5, 1979.

QUESTION PRESENTED

Whether the National Labor Relations Board properly determined that a hospital employer violated the National Labor Relations Act by banning union solicitation in all areas of the hospital to which the public had access and distribution of union literature in all those areas as well as in all work areas?

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, 49 Stat. 449, 61 Stat. 136, 88 Stat. 395 (29 U.S.C. § 141 *et seq.*) are:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.
>
> Sec. 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

STATEMENT OF THE CASE

A. *The Proceedings Below*

This case arose when Local 150-T, Service Employees International Union, AFL-CIO (hereafter "the Union") began an organizing campaign at Baptist Hospital in Nashville, Tennessee in August 1974, just after the National Labor Relations Act ("NLRA") was amended to cover nonprofit hospitals such as Baptist. (Act of July 26, 1974, P.L. No. 93-360, 88 Stat. 395.) When the hospital responded by promulgating a revised no solicitation/no distribution rule forbidding solicitation "in any area of the Hospital which is accessible to or utilized by the public" and, in addition "distribution of literature in any work area at any time," the Union filed charges with the NLRB contending, *inter alia*, that the revised rule violated § 8(a)(1) of the

NLRA, 29 U.S.C. § 158(a)(1). After two days of hearings upon the complaint filed by the General Counsel, the Administrative Law Judge concluded that the Hospital's new rule was invalid. Noting that "the record is lacking in any evidence that the work of employees was impeded . . . by the advent of the Union" (Pet. App. 75a), and that "there exist, without the necessity to prohibit all union solicitation . . . on nonwork time, rules which prohibit *unruly* conduct by any employee" (*id.*, emphasis supplied), the ALJ concluded that "the current no-solicitation, no-distribution rule is overly broad [and] interferes with employees Section 7 rights." (*Id.*, at 76a.)

The Board affirmed these findings and the conclusion that the employer had violated § 8(a)(1). (*Id.*, at 16a.) The Board also found that the company had violated §§ 8(a)(1) and 8(a)(3) by discriminating against Clyde French, the employee most actively involved in the organizing campaign. (*Id.*, at 16a-21a.) The Court of Appeals for the Sixth Circuit, however, taking a view diametrically opposed to that of the Board and the ALJ, believed that "the hospital did carry its burden of establishing special circumstances." (Pet. App. 19a.) That court thereupon denied enforcement to the Board's order, except that with respect to the finding that French had been discriminated against, and remanded the case to the Board to specify to what extent, if any, that discrimination was "unrelated to the hospital's no-solicitation rule." (*Id.*, at 12a.)

Particular stress was placed by the Court of Appeals upon testimony by two physician witnesses that "volatile or hostile discussion of any subject . . . would be detrimental to [the patients'] well-being" (Pet. App. 8a), and that "anything which interferes with patient care should be forbidden." (*Id.*) The Court of Appeals did not, however, point to any evidence that union solicitation would lead or had led to "volatile or hostile discussion," nor did it explain why the ALJ was wrong in concluding that existing general rules against disruptive activity were sufficient to prohibit such conduct as would in fact interfere with patients' well-being.

Shortly after the decision below, this Court decided *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, upholding a Board determination that a no solicitation/no distribution rule in a hospital was invalid as applied to a cafeteria used predominantly by employees.

B. *The Facts*

Reading the account of the relevant facts as explicated by the ALJ, by the Court of Appeals, and by Respondents (in their Brief in Opposition) gives the distinct impression that one is reading about three entirely different cases. For that reason, we present a fairly detailed account of the factual record, focussing particularly upon areas of inquiry whose importance is highlighted by *Beth Israel, supra.*

1. *The Rule, Its Promulgation and Its Application*

Before the advent of the union, and of the hospital amendments to the National Labor Relations Act, the Employer had a no-solicitation rule which read as follows:

> Solicitors—In order to protect employees from any form of solicitation, raffle, charity drives, etc., it is strictly prohibited for anyone to solicit patients or visitors while on hospital premises without written approval of the Administrator. Violation of this policy will subject employee to disciplinary action. Employees who discover persons making unauthorized solicitation should report this immediately to their Supervisor. [Pet. App. 32a-33a]

This rule "was basically designed to keep salesmen out of the Hospital" (Pet. App. 33a), and in terms applied only to solicitation of patients and visitors, not to solicitation of employees.

In October 1974, a new rule was posted, reading in its entirety as follows:

> The solicitation and distribution policy of Baptist Hospital has been revised. This has been done to help protect the privacy and rights of employees as well as to help maintain a good working environment and appearance throughout the hospital. The policy is as follows:

> No solicitations of any kind, including solicitations for memberships or subscriptions, will be permitted by employees at any time, including work time and non-work time in any area of the Hospital which is accessible to or utilized by the public. Anyone who does so will be subject to disciplinary action. In those work areas of the Hospital not accessible to or utilized by the public, no solicitations of any kind, including solicitations for memberships or subscriptions, will be permitted at any time by employees who are supposed to be working, or in such a way as to interfere with the work of other employees who are supposed to be working. Anyone who does so and thereby neglects his work or interferes with the work of others will likewise be subject to disciplinary action.
>
> No distributions of any kind, including circulars or other printed materials, shall be permitted in any work area at any time. [Pet. App. 34; A. 75]

This rule revision was a "direct result of [the] union organizational campaign." (A. 6; see also, A. 36-37; Tr. 142.)

Just before the official rule revision, at least one employee, Clyde French, handed out union literature and solicited employees on behalf of the union in both the parking lot and the cafeteria for about two months, but was not disciplined for that activity. (A. 21.) As the Hospital's personnel director conceded, "distribution in these areas [the parking lot and cafeteria, where most of the soliciting occurred] had not become a problem" (*id.*) during this period. While there was testimony that "when the union came in . . . discussions of union action, pros and cons, some for, some against, was causing disruption in our work force" (A. 5), the so-called "disruption" seems to refer only to complaints that the union organizer was "bothering" employees simply by attempting to discuss the union with them in the cafeteria (Tr. 425, 427.) Yet, while certain of the employees solicited did voice opposition to the union (A. 68) the exchanges never led to sharp words, rudeness, shouting, or any kind of disturbance. (A. 66-67; 72.) Nor was there *any* evidence that during the period distribution and solicitation were tolerated, any *patient or visitor* had complained

about, been affected by, or even been aware of union activity in areas accessible to them.

The evidence as to the precise areas covered by the October, 1974 rule in its various aspects is decidedly unclear in several respects. Generally, it was testified by the employer, that solicitation is permitted in "nursing stations, utility rooms, maintenance building, laundry building [and] dining areas." (A. 8.)

The "dining areas"—also referred to as "lounges" (see, *e.g.*, Pet. App. 36a)—consist of two rooms equipped with vending machines. One is located in the laundry building, some distance from the main building (*id.*), and holds up to fifty employees. Employees other than laundry employees were not known to use that dining area during break periods. (A. 16-17.) Similarly, the other dining area or lounge was small (25 to 30 person capacity) and was intended for use primarily by employees working on surgery. (A. 17.) There are 1800-1900 employees in all. (Tr. 85.)

There are, at Baptist, about 28 utility rooms (A. 17.) and about 26 nurses stations (A. 18.) The utility rooms are used both for work and, very occasionally, for breaks by employees. (A. 17-18.) Pursuant to the revised rule, no distribution of literature would be permitted in the utility room since they are work areas.[1] The nurses' stations, while they are internally off limits to the public, are "the hub for all the activity for patient care on [each] floor" and are work areas (*Id.*) Thus, while nurses' stations were represented to be areas where solicitation (but *not* distribution of literature) would be permitted, the availability of

[1] There was testimony by Mr. Victory, Baptist's Vice-President for Personnel Services (A. 3), that distribution of literature would be permitted in the utility rooms unless "it becomes a housekeeping problem." (A. 19). Nevertheless, this same witness testified that the no solicitation/no distribution rule would be enforced "as it is written" (A. 34), which would plainly preclude distribution in work areas such as utility rooms.

these areas for union activity under the October 1974 rule is surely quite limited: That rule forbids solicitation by or of employees "who are supposed to be working"; it would seem, from the description of their function, that nurses' stations are ordinarily populated by employees "who are supposed to be working."[2] Further, it seems that categories of employees not directly involved in patient care would not have access to "*nurses*'" stations either as solicitors or solicitees.

The hospital personnel director did not mention either employee rest rooms or locker rooms as areas in which solicitation is permitted.[3] Thus, if such areas are available, their number and accessibility by potential organizers was not established.

In the end, then, the testimony definitely established only that *distribution* of union literature was permitted in the two small, remote "dining areas" or "lounges."[4] While

[2] The Hospital interprets "supposed to be working" to mean "on duty," even if there is no work to be done at the time. This was evidenced by an incident regarding solicitation of two employees who were on duty but, at the time, were relaxing and conversing because they had no work to perform. The union organizer, Mr. French, was disciplined for conversing with the two "on duty" employees even though they had no work to perform at the time and were permitted by their supervisor to converse between themselves (Pet. App. 44a-45a, 80a; Tr. 376, 379, 381).

[3] While there were references to a "snack bar" in which employees frequently took breaks (A. 47, 71) it appears that the "snack bar" was simply that area of the cafeteria which had vending machines. (A. 49).

[4] Thus, the court below misconstrued the record when it assumed that "numerous locations" at the hospital were available for union activity. (Pet. App. 10a). In particular, that court plainly erred in stating that "[s]olicitation *and distribution* are permitted in *several* employee lounges . . . , 28 utility rooms, 26 nurses' stations and those rest rooms which are restricted to employees." (Pet. App. 3a.) Distribution was clearly forbidden in most of the mentioned areas, and there were *two* lounges, both in specialized locations, not "several."

it was indicated that *solicitation* would be allowed in certain other areas, those areas do not appear to be frequented generally by off-duty employees, the only employees who could be solicited.[5]

As to areas where solicitation (and distribution) is *not* permitted, the evidence is silent entirely as to the character and use of certain of those areas—corridors and elevators, for example.

With respect to the cafeteria, it was established that this facility holds approximately 150 persons at a time. (A. 16)[6] The cafeteria is an area "where the employees and general public eat and relax" (Pet. App. 36a; A. 12). Normally, when employees are in the cafeteria, they are on break or lunch period (Pet. App. 35a-36a; A. 12), and most employees normally take at least one of their breaks each day in either the cafeteria or the adjacent snack bar. (A. 49, 71). Patients and their families sometimes use the cafeteria. (Pet. App. 35a; A. 12). However, patients do not receive any treatment in the cafeteria (*id.*), and must receive permission to leave their floor to use the cafeteria. (Pet. App. 35a; A. 64). Consequently, only a "small percentage" of the people using the cafeteria are likely to be patients. (*Id.*; see also A. 50).[7] And, employees are ordinarily identifiable

[5] Most of the rest rooms were apparently available to the public as well as to employees, and thus were off limits for union solicitation or distribution (Pet. App. 35a; A. 14).

[6] Under "Miscellaneous Benefits and Services" the Hospital's Employee Handbook states: "The hospital cafeteria is available to all employees and is open for breakfast, lunch and dinner. Employees must wear name pin to receive special employee rate." (A. 105).

[7] The Hospital's personnel director testified to a "study" *by hospital personnel* showing that a significant percentage of the people using the cafeteria were "nonemployees." (A. 26-27). However, that "study" covered only meal hours, although the cafeteria area is open for vending machine use twenty-four hours a day; the "study" also did not include, during meal hours,

in the cafeteria, because they must wear identification pins on their uniforms and will receive a good discount only if wearing the pins (A. 36). There was no evidence that Mr. French, who solicited extensively in the cafeteria (A. 51), ever erroneously approached a patient or a visitor. In fact, Mr. French noted that patients are usually identifiable because "they will be in their pajamas and bathrobe." (A. 50).

With respect to the lobby and the gift shop—the other areas in which solicitation was forbidden because they are open to the public and as to which any substantial evidence at all was elicited—it was shown that patients might enter either area (if they obtain permission to leave their floor) but that normally, patients are not found in those areas. (A. 11, 13).

2. *The Asserted Justification for the No-Solicitation/No-Distribution Rule*

The October 1974 rule contains, in the first paragraph, its own explanation of why the rule was promulgated—primarily "to help protect the privacy and rights of employees." (Pet. App. 34a; A. 75.)[8] *No* mention was made in this document of any concern for the medical effects of union solicitation upon patients. ***Nor was the hospital's medical***

people who used the vending machines or brought lunch; the survey did not distinguish, among "nonemployees," the percentage of patients, of patients' visitors, of hospital volunteers, of student nurses, physicians, and technicians, and of doctors and private nurses rendering care to patients but not employed by the Hospital; and finally, the number of days, the hours, the time of year, and other facts pertinent to assessment of the survey were not given, nor did the person who actually conducted the survey testify. (A. 36-37). Presumably for these reasons, neither the Court of Appeals nor Respondent (see Br. in Op., 5) has relied upon this so-called "study," and we consider its lack of relevance and reliability to be conceded.

[8] The testimony bears out that complaints by employees that they would rather not be approached concerning the union were one reason the new rule was announced. (See pp. 5-6, *supra*.)

staff consulted when the October 1974 rule was devised, although legal counsel was. (Pet. App. 66a, 72a; A. 21-22, 72-73). Nonetheless, the Employer endeavored to justify the rule as primarily motivated by the need to protect patients from disturbing influences anywhere in the hospital.

Toward this end, two private physicians testified. Dr. Birmingham had never known of anyone upset by union solicitation, nor did he have any knowledge of whether union solicitation might be disruptive. (A. 44-46). While he testified that a "volatile or hostile" or a "heated discussion" could medically affect a patient (A. 40, 42), he did not think that "a normal conversation between one employee who asked [another] employee to sign a union card . . . would have any effect." (A. 45). Also, while Dr. Birmingham testified that the hospital staff tries to "shield the patient as much as we possibly can from . . . bad news" (A. 40), he specifically noted that television sets are played in patients' rooms, and that some patients are upset by this. (A. 41). The remedy is not to ban televisions, but to move the disturbed patient to another room. (*Id.*)

Dr. Ricketson's testimony was similar. He stated that "there shouldn't be any unnecessary turmoil, confusion, loud noises and things going on" in areas open to patients or patients' families, because the patient's medical condition could be affected. (A. 53). At the same time. Dr. Ricketson was not aware of any adverse effects from union solicitation (A. 61) and, in fact, did not know what union solicitation consists of. (*Id.*)[9] He did not think that the average patient would be disturbed by employees sitting in the cafeteria quietly discussing the union, and was primarily concerned with preventing "a general meeting" or "a speech." (A. 62; see also A. 63-64).

[9] The following colloquy occurred on cross examination, after Dr. Ricketson had given his "expert" opinion on direct examination: Q. "Union solicitation; do you know what [effect] it would have?" A. "First, may I ask the question to be sure you and I understand; what is union solicitation, what does it consist of?" (A. 61).

Dr. Ricketson also suggested at points that patients could become detrimentally upset simply overhearing "activities that do not have to do with the taking care of patients . . ." (A. 52-58). However, there was no evidence that all other conversations "that do not have to do with the taking care of patients" were banned in areas such as the cafeteria. Indeed, employees are specifically cautioned that discussion which *does* concern care of individual patients "often reveals confidential information" so that employees should be "careful about [such] conversation in elevators, eating places and other places of public assembly." (A. 98-99).[10] It is also noteworthy that this caution is *not* stated as a *ban* on such discussions with other employees in public places but, rather, as an admonition to "be . . . careful" to conduct such discussions discretely.

Finally, while Dr. Ricketson did indicate that even seriously ill patients may have considerable mobility—for example, before an operation (A. 54)—it appears that the medical staff in practice is not particularly concerned with shielding such persons from the ordinary activities of the outside world. For, pre-operative patients may be given "a two hour leave if they want to go out and eat dinner at a public restaurant." (A. 54-55).

The Administrative Law Judge's summary of the pertinence of this "expert" testimony, in light of the rest of the record, is quite apt:

> [T]he testimony of the physicians in the instant

[10] Some of these rules read as follows:

> *Noise*—Noise deters patient treatment and recovery. It is each employee's obligation to avoid unnecessary noise in the hospital. Speak in a quiet, pleasant tone; use care in handling equipment, avoid clashing dishes, glassware and metallic objects. Employees should be alert for sources of unnecessary noise and to report these promptly to their Supervisor. [A. 100].
>
> *Employee Conduct*—As a hospital employee at Baptist you

case was directed to *possible* effects of union campaigns and was given pursuant to certain hypothetical questions. These questions involved what might be considered the *possible* consequences of *possible* violent reactions of employees to union literature. However, there is no evidence in the record of sufficient substance to show that the conduct of the Union or any of the Respondents employees was of such nature as to make the rule an overriding necessity. Moreover, there are other sections of the Respondent's "Employee Handbook," which would, or could, be utilized by the Respondent to discipline an employee engaged in union solicitation who does not otherwise conform to the rules of employee conduct. Thus, there exist, without the necessity to prohibit all union solicitation anywhere on the Respondent's premises on nonwork time, rules which prohibit unruly conduct by any employee, including one engaging in otherwise lawful union solicitation. Additionally, even newspaper articles or television or radio broadcasts available to patients could possibly be more upsetting to a patient's psychological well being than the observation by a patient of quiet and mannerly union solicitation of one employee by another. Yet, it is highly improbable that the Respondent would care to eliminate these means of communication from the world outside the Hospital. [Pet. App. 75a, emphasis in original; footnote omitted.]

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have high standards to maintain. You are urged, therefore, to refrain from loud talking and laughing, gossiping, needless complaining, and any other activity that would be disturbing to the patient or out of place in a hospital. [A. 99-100].

Strangers and Difficult Persons—The proper handling of difficult persons is important in order not to disturb patients. In all cases make the situation known to your Supervisor and seek immediate aid if possible from qualified hospital personnel. DO NOT use force except in self-defense against other employees, patients or visitors. To do so may make you liable for any damages or injuries. [A. 102].

INTRODUCTION AND SUMMARY OF ARGUMENT

Beth Israel Hospital v. *NLRB*, 437 U.S. 483, concerned a Board order which had invalidated a hospital's no-solicitation/no-distribution rule as applied to a hospital cafeteria. Dividing 5-4 as to rationale but unanimous in result, this Court sustained that order. *Beth Israel* is critical—indeed, conclusive—for this case for three reasons.

I. On the precise question there decided—the application of a no solicitation/no distribution rule to a hospital cafeteria and coffee shop predominantly used by employees—that case is indistinguishable. Among other similarities to *Beth Israel* are: The cafeteria in this case, while used by patients and visitors, is the principal gathering place for employees; during a period when union solicitation was permitted, no patients or visitors were affected; and, a less restrictive approach would apparently prevent the disturbances feared. Thus, not only does *Beth Israel* directly require invalidation of Baptist's rule as applied to the cafeteria and snack bar but the striking similarities between the two cafeterias illustrates why the NLRB's approach of operating upon presumptions regarding the relative weight of the interests of employees and employers in certain functional areas of hospitals is plainly correct.

II. *Beth Israel* establishes two basic principles applicable beyond the cafeteria context—*viz.*, that Congress did not, in enacting the 1974 NLRA amendments covering non-profit hospitals, change the normal rule that an employer who promulgates a broad no-solicitation/no-distribution rule has the burden of justifying that rule, and that the Board's evaluation of such a justification is entitled to deference in health care industry cases to the same extent as in cases arising in other industries. Indeed, as the history of the 1974 Amendments demonstrates, Congress specificially recognized that in deference to the principles of employee self-organization and collective bargaining the national labor policy tolerates some risk of interference with patient care. And, that history also illustrates that the NLRB in deciding hospital no-solicitation/no distribution

rule cases, as in all others, is to fulfill the principal function of explicating national labor policy by balancing the employee interest in self-organization against the employer's management interest. Nor can that function be usurped by the respondent hospital through the simple expedient of presenting "medical" testimony. The Labor Board is fully equipped to judge the pertinence of such testimony on the basis of other facts developed. Often, as here, the asserted medical reasons turn out, upon analysis, to be nothing more than a determination that a risk is not justified where the countervailing interest is employee self-organization, while a risk of the same magnitude is countenanced by the hospital medical staff where the countervailing interest is the hospital's own.

III. Finally the *Beth Israel* majority expressly approved the Board's general rule, established in *St. John's Hospital & School of Nursing*, 222 N.L.R.B. 1150, that, outside immediate patient care areas, hospitals may not prohibit union solicitation and distribution "in areas, other than immediate patient-care areas, such as lounges and cafeterias absent a showing that disruption to patient care would necessarily result if solicitation and distribution were permitted in those areas." (437 U.S., at 495) While there appears to be some question concerning whether that approval extends beyond cafeteria cases (see *NLRB* v. *Baylor Univrsity Medical Center*, ... U.S. ....., 44 L.W. 3298 (Oct. 30, 1978) (*per curiam*), the reasoning of *Beth Israel* supports the conclusion that the Board's basic position is entirely sound. At any rate, applying either the *St. John's Hospital* standard or the standard indicated by the concurring Justices in *Beth Israel* (whether there has been shown to be "a reasonable possibility of harmful consequences to patients or visitors" (437 U.S. at 516)), the Employer in this case must be held to have failed to meet its burden. Alternatively, if the Court is not satisfied that the Employer has failed to do so and believes that a case-by-case inquiry into the degree of interference with effective union organizing activity and with patient care in *specific areas* is needed, the Board's order should not be reversed; rather,

in that event the case should be remanded for further factual development, with particular emphasis upon questions relating to hospital restrictions upon activities analogous to union solicitation and distribution in their potential physical and emotional impact upon patients and visitors.

ARGUMENT

I

The Cafeteria

In *Beth Israel, supra,* the Court held that "the Board's conclusion [in *St. John's Hospital, supra*] that 'the possibility of any disruption in patient care resulting from solicitation or distribution is remote' . . . as applied to petitioner's cafeteria, is fully supported by the record." (437 U.S. at 502.) A review of the "record" deemed to support the Board's conclusion demonstrates that the function of the cafeteria at Baptist is materially identical to that at Beth Israel, and that no greater probability of disruption has been shown here.

Baptist Hospital, like Beth Israel, provides "patients' meals . . . in their rooms" and "[a] patient is not allowed to visit the cafeteria unless his doctor certifies that he is well enough to do so." (*Id.*, compare p. 8, *supra*).[11] Thus, in Baptist Hospital, as in Beth Israel,

> patient use of the cafeteria is voluntary, random, and infrequent . . . Patients who frequent the cafeteria would not expect to receive special attention or primary care there and any unusually sensitive to seeing union literature distributed or overhearing discussions

[11] In *Beth Israel*, it was possible to quantify precisely the infrequency of use by patients and visitors, because a careful study had been done by the Hospital for an independent purpose. Here, while no such study was available (see pp. 8-9, n. 7, *supra*), witnesses presented both by the General Counsel and the Employer agreed that the number of patients using the cafeteria was small, and that more employees than nonemployees eat there.

There was no testimony in this case that any patients are specifically encouraged or instructed to use the cafeteria for medi-

about unionism, readily could avoid the cafeteria without interfering with the hospital's program of care. [437 U.S. at 502]

Further, just as it was "especially telling" in *Beth Israel* that limited union solicitation for a period had occurred "apparently without untoward effects" (*id.*), so here, the fact that after two months of unrestrained solicitation and distribution Baptist could not point to *any* evidence that even a single patient or visitor was aware of, much less harmed by, that activity in the cafeteria is no less "telling"[12] Nor can the physicians' testimony in this case fill the gap: the doctors' opinions were premised on the assumption that the union solicitation would be conducted in such a

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cal reasons. Compare *Beth Israel*, 437 U.S. at 517 (Powell, J., concurring):

> No testimony was introduced that the practice at Beth Israel is to seek early rehabilitation of patients by encouraging them to leave their rooms at the earliest time compatible with their condition, and to move about the hospital. The further weakness in petitioner's case is that it introduced no medical testimony that related such practices and needs to its cafeteria.

[12] That *employees* may have been annoyed is of no moment. In any industry, some employees may dislike interference with their daily routine by employee-organizers, or may be irrevocably opposed to unions as such and complain of solicitors for that reason. To permit employee resistance to solicitation to act as a veto upon union organizing would be to negate the long-accepted view that "the right of employees to self-organize and bargain collectively . . . necessarily encompasses the right effectively to communicate regarding self-organization at the job site." (437 U.S. at 491).

Moreover, as long as the solicitors are, as here, courteous and willing to move on if the employees approached so request (A. 66, 72), overtly disruptive reactions by employees approached ought not to be a ground for refusing socilitation rights; if it were, the anti-union employees could effectively thwart union organization simply by purposely volatile reactions. Rather, any rules or discipline in such circumstances should be directed at those employees whose excessive action creates the problem. Compare *Schneider* v. *Irvington*, 308 U.S. 147, 162:

manner that patients or visitors would be disturbed, while the record of actual solicitation here, as in *Beth Israel*, provides no basis for that assumption as regards the cafeteria.[13]

Moreover, as in *Beth Israel*, Baptist "adopted a less restrictive approach to behavior in the cafeteria which would be at least as disquieting to patients as union solicitation . . ." (437 U.S. at 502-503, n. 20). For, like Beth Israel, Baptist noted that patients and visitors could be upset by overhearing conversations between employees concerning patients' conditions but, rather than banning such conversations in the cafeteria, merely cautioned employees to "be careful" not to be overheard.

It appears, in addition, that "petitioner's rule was more restrictive than necessary" to prevent upsetting patients and interferring with their care. (*Id.* at 502). The pre-1974 version of the no solicitation/no distribution rule at Baptist forbad these activities with respect to patients and visitors. As in *Beth Israel*, such

> a rule . . . would do much to prevent potentially upsetting literature from being read by patients. . . . This rule could be readily enforced at petitioner's hospital . . . since employees are required to wear name tags . . . [437 U.S. at 503-504, n. 23]

In addition, as the ALJ in this case stressed (p. 12, *supra*), existing general hospital rules of conduct could be

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> This constitutional protection [the First Amendment] does not deprive a city of all power to prevent street littering. There are obvious mehods of preventing littering. Among these is the punishment of those who actually throw papers on the streets.

[13] As at Beth Israel, "it has not been shown that organizational activity . . . actually resulted in distribution to nonemployees." (*Id.* at 503-504, n. 23). See also *id.*, at 516 (Powell, J., concurring):

> While the hospital was concerned about the disruptive effect on patients of employees' conversations about the medical progress of particular patients, it implemented only a precatory rule, not an outright prohibition of such conversations in the cafeteria.

invoked to prevent unruly, disruptive, or noisy union organizing activity. Furthermore, a ban upon large group meetings or speeches—which is probably already implicit in the general conduct rules—would eliminate the sort of inappropriate activity Dr. Ricketson identified (p. 11, *supra*) as potentially harmful to patients.

The *Beth Israel* court also indicated, although it did not decide, that "the availability of one part of a health-care facility for organizational activity *might* be regarded as a factor . . . to be considered." (*Id.* at 505, emphasis supplied.) In this case as in *Beth Israel* that problem need not be resolved, for

> [t]hat consideration is inapposite here, . . . where the only areas in which organizational rights are permited is not conducive to their exercise [and where the cafeteria] is a 'natural gathering area' for employees . . . and one in which the risk of harm to patients is relatively low as compared to potential alternative locations. . . ." [*Id.*]

For, it appears that the only areas in which the Baptist rule permits solicitation and distribution are two small dining areas used primarily by specialized groups of employees; and the areas in which solicitation but not distribution is theoretically permitted are areas in which work may be in progress at any time, so that solicitation could be forbidden for that reason.

Thus, the Baptist cafeteria is not one of the "many hospital coffeeshops and cafeterias that are primarily patient and patient-relative oriented." (437 U.S. at 509) (Blackmun, J., concurring). Rather, "the undisputed evidence portrays this cafeteria as being one essentially operated for employees as their primary gathering place." (*Id.* at 517) (Powell, J., concurring).

In the end, the rather remarkable similarity between the main cafeteria and snack bar in this case and those in *Beth Israel* illustrates the wisdom of permitting the NLRB to proceed with its task of assessing no solicitation/no distribution rules in hospitals by developing general presumptions based on its experience and applicable to certain kinds of situations, and placing the burden upon the employer to rebut such presumptions by showing with specific evidence that "the prohibitions [are] *necessary* to avoid disruption of health care operations on disturbance of patients." (*Beth Israel*, 437 U.S. at 507, emphasis supplied). For, through hearing many hospital organization cases in the several years since passage of the 1974 Amendments,[14] the Board has acquired a familiarity with the internal operations of hospitals similar to that it had developed with respect to industrial plants prior to developing the parallel presumption approved in *Republic Aviation Corp.* v. *Labor Board*, 324 U.S. 793. As the comparison above illustrates, there do appear to be, from hospital to hospital, certain constant factors in the general function and operation of specific areas. To nonetheless require the Board itself to provide evidentiary proof, in each case, of the basic facts supporting the presumption, or to allow hospitals to place that burden upon the Board simply by introducing generalized "medical" testimony such as that introduced here, would be to burden the NLRB and the courts of appeals for no useful purpose.

II

Congressional Intent and The NLRB's Role

In this case, the NLRB applied the *St. John's Hospital* presumption to all areas other than immediate patient care areas. In assessing this application the Court of Appeals relied upon two factors explicitly rejected in *Beth Israel*: First, that court perceived in the legislative history of the 1974 Amendments sanction for requiring the Board to accord less weight to employees' organizational rights in the hospital context than in others. (Pet. App. 9a.) And second,

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[14] Prior to 1974, the Board had in a few cases considered the validity of no solicitation/no distribution rules in proprietary hospitals, but "no clear rule merged from its decisions." (*Beth Israel*, 437 U.S. at 494.)

the Court of Appeals by its heavy reliance upon the two doctors' testimony, appeared to require the Board to defer to the judgment of the hospitals' medical advisors, rather than performing itself the task of balancing the relative interests of the employer and employees.

A. As the *Beth Israel* opinion noted (437 U.S. at 496-500), the history of the 1974 Amendments does not support the view that Congress intended to require that any conceivable interference with patient care overrides the employees' rights to organize and to bargain collectively; indeed, the fair implication of that history is quite the opposite—that Congress did not intend employees' interests to be sacrificed where interference with the hospital's admittedly vital function is only a hypothetical possibility. For, over and over again the legislative history of the 1974 Amendments demonstrates the underlying premise of that legislation to be that hospitals are not special in any way which justifies depriving their employees of the basic rights enjoyed by other employees under the NLRA.[15] Indeed, the elimination of the nonprofit-hospital-exemption reflected Congress' judgment that hospital care would be improved by extending the protection of the Act to nonprofit health-care employees. Congress found that wages were low and working conditions poor in the health-care industry, and that as a result employee morale was low and employment turnover high. Congress determined that the extension of organizational and collective-bargaining rights would ameliorate these conditions and thereby elevate the standard of patient care. (437 U.S. at 497-498.)

[15] The principal purpose of the 1974 Amendments was to remove the special exemption for nonprofit hospitals contained in the Taft-Hartley Act. (S. Rep. No. 93-766, 93rd Cong. 2d Sess., at 3 (hereafter "S.Rep."); H.R. Rep. No. 93-1051, 93d Cong. 2d Sess., at 4 (hereafter "H.Rep.").) Thus, the Act "restore[d] to the employees of non-profit hospitals the same rights and protections enjoyed by the employees of proprietary hospitals and most all other employees [because] the public interest demands that employees of health care institutions be accorded the same type of treatment under the law as other employees in our society . . .". (H. Rep., at 4; see also S. Rep., at 3, 4).

Thus, Congress acted in 1974 on the premise that employee self-organization and effective patient care are not inherently incompatible and on the belief that ultimately union activity in hospitals will aid in accomplishing the hospital's medical goals. Further, while Congress felt that the needs of patients in health care institutions require special consideration in the Act (S. Rep. No. 93-766, 93d Cong. 2d Sess., 3), as stated in *Beth Israel*:

> Congress addressed its concern for the unique problems presented by labor disputes in the health-care industry by adding specific strike notice and mediation provisions designed to avert interruption in the delivery of critical health care services; none expresses a policy in favor of curtailing self-organizational rights. Indeed, although Congress recognized that strikes could cause complete disruption of patient care and enacted provisions designed to forestall them, it apparently felt that extension of the right to strike was sufficiently important to fulfillment of its goals to permit strikes despite that result. [437 U.S. at 499.] [16]

[16] The balance struck in the 1974 Amendments was explicitly stated to be a "compromise." Legislative History of the Coverage of Non-Profit Hospitals under the NLRA, 112 (G.P.O., 1974) (Remarks of Sen. Taft), "a very carefully developed and finely tuned balance of competing considerations and philosophies that will, at the same time, protect labor and management rights and promote good health care." (Leg. Hist. 91 (remarks of Mr. Cranston)).

> [T]he National Labor Relations Board in administering the Act should understand specifically that [the] Committee understood the issues, confronting it, and went as far as it decided to go and no further, and the Labor Board should use extreme caution not to read into this Act by implication—or general logical reasoning—something that is not contained in the bill, its report and the explanation there . . . . [I]n this carefully tailored legislation Congress decided to treat the health care industry uniquely *in certain respects*. It decided to go so far, and no more. I trust this bill will be treated . . .

Indeed, Congress' determination to accord hospital employees a right to strike[17] demonstrates the unreality in terms of national labor policy of the Court of Appeals' position that the slight chance that a few patients will be aware of union activity in hospitals justifies severe restrictions upon employee rights. For, obviously, a patient or visitor who approaches a hospital surrounded by pickets will be well aware that there is union activity. And, a patient who is either treated by a skeleton staff or turned away or transferred because of a strike will not only be aware of a labor dispute but will be directly, rather than hypothetically, affected by it. A Congress willing to tolerate such occurrences plainly intended that the communication among employees long held essential to effective self-organization not be sacrificed to an immeasurably smaller risk of interference with patient care.

Further, given the hospitals' litigation posture since the passage of the 1974 Amendments, it is particularly striking that although many representatives of hospitals and of hospital associations appeared before Congress to express concern about continuity of patient care in the event of a strike, and the possible fragmentation of bargaining units, *none* so much as suggested that the mere knowledge of employee efforts to organize might adversely affect the health and well-being of patients. Nor were there any suggestions that the Act be further amended with regard to solicitation and distribution rules in hospitals. (See generally Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 93d Congress, 1st Sess. on S. 794, etc.) Against this background, the hospitals' plea to the courts in this and other cases that

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in the same spirit. [Leg. Hist. 361, (remarks of Sen. Williams, emphasis supplied).]

[17] Congress specifically *rejected* the views that strikes and picketing either could not be tolerated at all in hospitals (see e.g., S. Rep. at 39 (individual views of Sen. Dominick); Leg. Hist. 300, (remarks of Rep. Henderson)) or should be severely limited. (See Leg. Hist. 322-329; *compare* § 213 of the LMRA, 29 U.S.C. § 183.))

allowing such communications must be forbidden to assure proper medical care comes too late to be accepted.

B. Congress in 1974 not only indicated, by what it did as well as by what it did not do, that *some* risk of short-term disruption of patient care would be tolerated in the ultimate interest of stable labor relations, it also, as *Beth Israel* establishes, "was satisfied to rely on the [NLRB] to continue to exercise the responsibility to strike the appropriate balance between the interests of hospital employees, patients and employers." (437 U.S. at 497.)[18] For, while

> the Board is not expert in the delivery of health-care services—neither is it in pharmacology, chemical manufacturing, lumbering, shipping, or any of a host of varied and specialized business enterprises over which the Act confers its jurisdiction. But the Board is expert in federal national labor relations policy, and it is in the Board, not respondent, that the 1974 amendments vested responsibility for developing that policy in the health-care industry. [*Id.* at 501.]

The record in this case with regard to the supposed medical justification for the no solicitation/no distribution rule demonstrates well why the Board must be permitted to perform, in the hospital area as in others, "the balancing of the conflicting legitimate interests" (*Labor Board* v. *Truck Drivers' Union*, 353 U.S. at 87, 96), and why "[i]n each generic situation, the primary responsibility for making this accommodation must rest with the board in the first instance" (*Hudgens* v. *NLRB*, 424 U.S. 507, 522.) For, even if "there is [no] doubt as to the sincerity of the testimony of the two physicians who testified" (Opinion of ALJ, Pet. App. 70a), "[their] assessment of the need for

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[18] That Congress so determined is evident, of course, from the simple fact that, rather than creating a special enforcement procedure, or a more highly specialized agency to deal with labor relations in hospitals, the 1974 Amendments simply eliminated an exception and thereby committed hospital labor relations to the general policies and procedures of the NLRA.

[the no solicitation/no distribution rule] * * * overcompensate[s] [their] goals and give[s] too little weight to employee organizational interests." (*Beth Israel*, 437 U.S. at.)

The doctors' testimony here graphically exhibits this "overcompensation." While the doctors maintained that shielding patients from bad news, noise, hostility, and similar influences was necessary to good hospital practice, it is obvious both from the record in this case and from common experience with hospitals that the interferences with this ideal of tranquility are many, and that hospitals consciously chose to tolerate these interferences when there are compensating reasons for doing so.[19]

For example, as the doctors acknowledged, television sets and visitors often upset patients, either because of noise level or because of the topics shown or discussed. The hospital administration, however, has evidently determined that TV's and visitors are themselves important to many patients, and therefore has permitted them and has not undertaken to censor the shows which may be seen or the conversations between visitors and patients. Rather, the effort is to shield those particularly sensitive from the dis-

[19] [T]he imposition of relatively inflexible medical or organizational procedures on the hospitalized patient [, though] often justified in the interest of providing efficient care for the majority of patients, . . . as applied to the unique needs of the unique patient may include elements which are in direct conflict with the goals of both medical care and patient care. An illustration can be found in the experience of patients with respect to sleep or rest.

There are many conditions for which medical goals include maximizing opportunities for physical rest in order to facilitate recovery. . . . This medical goal is symbolized by the commonly seen street signs denoting a "Hospital Zone of Quiet."

Yet ironically many factors inherent in the social structure and organization of a modern hospital converge to make rest more difficult for all but the heavily sedated patient. Far from being restful, patients report great difficulty in acquiring uninterrupted sleep in most hospitals. The patient is often awakened

turbing influences, and, presumably, to limit these influences to reasonable hours and locations.[20]

Similarly, even if, as one of the doctors' testified, it is upsetting to patients and visitors simply to overhear conversations between employees which suggest that employees have concerns other than patient care, hospitals do not typically require absolute silence among employees except for discussions of patient care and medical practice.[21] Rather, so far as appears, hospitals permit their employees, like other employees elsewhere, to discuss their home lives, their friends, their monetary affairs, religion, politics, cur-

to meet the convenience of hospital routine. His personal biological timetable is upset. There is considerable noise engendered by the coming and goings of a large number of people, the movement of equipment, and the urgent voice of the hospital page. Most hospital patients must try to sleep in close proximity to other patients whose personal habits, periods of wakefulness and sleep, desire for entertainment, and requirements for medical attention may vary from their own. [Georgopoulos (ed.), *Organizational Research on Health Institutions* (1972), at 217.]

[20] See *Lutheran Hospital of Milwaukee* v. *NLRB*, 564 F.2d 208, 215 (C.A.7), vacated and remanded 438 U.S. 702.

[A] typical patient or visitor would be indifferent to solicitation or distribution conducted outside of immediate patient care areas . . . because the conduct of employees in locations such as cafeterias or lounges is irrelevant to the ordinary patient . . . We cannot believe that patients and their visitors who are present in these areas [cafeterias and lounges] are likely to become unsettled upon exposure to organizational activities conducted by employees. Labor unions are common entities in this country, and only an extraordinary patient would be so dismayed at witnessing an attempt to form one that his health would actually become impaired.

[21] See, *e.g.*, D. Gold, *Bellevue* (a documentary account of a week in a big city hospital) (1975), at 169:

At 9:30, [a nurse] joins several other nurses for a coffee break in the snack bar. It's the only place to have coffee, unless you brew it yourself, so the nurses tolerate the high noise level. They exchange tidbits of news and gossip and experiences. One

rent affairs, and all manner of other subjects—including such job-related matters as work schedules, relationships with supervisors, promotions, salary, and work rules among themselves in areas where patients may overhear.[22]

Thus, the fact that there are, in hospital work, situations and locations in which any conversation not related to the immediate patient care task at hand would be unacceptable —in the operating room, for example, or while examining or bathing a patient—has not led the hospitals to intrude upon ordinary human relationships among employees when they are *not* engaged in particularly sensitive tasks. The hospital does, of course, through its rules of conduct reserve the right to discipline employees who do not use good sense in where and how they talk among themselves. (See p. 13, *supra.*)

Yet, with respect to union organization, Baptist Hospital refuses to accept *any* risk of potential disturbance due to union organizational activity or to deal with the risk by rules directed not toward a total ban on such activity but toward minimizing the potential for patient and visitor in-

is planning a week at the Club Mediterranee in Martinique. Another, new to Bellevue, recalls her days with the Peace Corps in Colombia.

"It was on the Colombia-Venezuela border and I was the only nurse there," she says. "There were always military skirmishes going on. Our equipment included hundreds of vaginal speculums, don't ask me why, but antiseptic was hard to find. I would have settled for Listerine. We were treating troops hacked by machetes. After that, this place seems calm."

[22] See also, *id.*, at 374-375:

Chiarelli [a nurse] finishes rounds; the nurses scatter. The ward seems to be in the order in which Shiarelli wants to see it. She sits down, something she doesn't do often, and chats with the new nurse on the day shift.

"I've been a nurse in the jungle and I've been a nurse in the city and I'm not sure there's that much difference," the nurse says to Chiarelli . . . "The red tape, I just can't accept it. I can't believe that if you want a blood-pressure cuff, you can't get one. It takes years to get important equipment."

volvement.[23] Indeed, the two doctors who testified for the Hospital were willing to testify that union solicitation constituted an unacceptable risk to patient care, even though they had no knowledge of any situation in which such a risk became a reality, and even though they had absolutely no experience with union organizational activity, and no idea of how likely it was that union activity would create a disturbance.

This suggests only that in the calculus of values of the hospital and its medical advisors, levels of potential interference with patients entirely acceptable where countervailing interests favorable to the hospital are perceived, are not acceptable where the countervailing interest is employee self-organization. This calculus of values is clearly *inconsistent* with that reflected in the national labor policy as elucidated in the 1974 Amendments. For, as noted previously, Congress acted upon the premise that in the long run employee self-organization would be beneficial to patient care. Indeed, even though "The importance of the employer's interest in protecting patients . . . cannot be gainsaid" (*Beth Israel*, 437 U.S. at 505), Congress was willing

[23] In this regard, one incident stressed by the Hospital is particularly instructive: Counsel for the Hospital attempted to establish that "there were two employees [Mr. French] solicited to sign union cards that became hostile, very hostile." (A. 67). It turned out, however, that the "hostility" was simply that one employee said, in the cafeteria, that "if the union came in, she would walk out and quit . . . [P]eople [solicited] during the course of the campaign expressed their likes and dislikes [in the main cafeteria] even to the point of being openly in support of or openly in opposition to the union." (A. 67-68). It is likely, of course, that other employees discussed in the cafeteria an intention to resign from their jobs in the future and, as well, that on other subjects—political campaigns, for example—employees at meals "expressed their likes and dislikes . . . even to the point of being openly in support or openly in opposition." Thus, not only was the hospital acting upon a hypothetical risk of "hostility" which less restrictive means could prevent but, seemingly, it was defining as "hostility" in the union context personal interactions of a type which occur daily in ordinary human affairs, inside as well as outside hospitals.

to tolerate actual physical interference with patient care in the form of strikes to further that long-range goal. It is for this reason that the Labor Board must be permitted independently to perform the "difficult and delicate responsibility, . . . subject to limited judicial review" of "striking [the] balance to effectuate national labor policy" (*Truck Drivers Union, supra,* 353 U.S., at 96).

One further point is here relevant: In striking that balance, the NLRB can not be limited to the hospital employer's testimonial averments concerning the strength of its interest. Rather, there is, in any case of this kind, *objective* evidence available regarding the hospital's true medical judgment upon the degree of control over nonmedical events necessary to further its basic health mission. Specifically, the employer's actions in situations analogous to union solicitation but not involving union activity are the best indicia of its true medical judgment.[24]

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[24] It is worth noting that official hospital policy regarding solicitation and distribution and actual practice often diverge. As one hospital attorney noted soon after passage of the 1974 amendments:

> Two aspects of past practice are critical to our consideration. One is the almost universal policy of health care institutions to allow in and around their premises a wide variety of solicitors representing many causes and purposes. Another is the almost universal rule broad in scope and observed in the selective breach, which in words, not practice, typically prohibits all solicitation on hospital premises.
>
> This anomaly is one of the most important of the several practical problems that the new legal coverage imposes on hospitals. That is, the hospital understandably asks, 'How can we continue to support the activities we have in the past and not open the doors to all form of union solicitation?'. . . .
>
> Among the many solicitation/distribution activities permitted by hospitals are:
>
> 1. Sales promotion by representatives of pharmaceutical concerns.
>
> 2. Selling of raffle tickets and the like for institution-related fund-raising activities.

Where, as in this case and in *Beth Israel,* activities with potential for *emotional* disturbances of at least sensitive individuals are either not curbed at all or are regulated in a manner less restrictive than an outrgiht ban, the actual medical judgment of the hospital must be taken to be that the real danger of interference with medical care is not serious enough to require total exclusion. In contrast, oral opinion testimony by hospital administrators and medical advisors is much more likely to be tailored to litigation needs than is long-standing actual practice.

Thus, the NLRB's interest balancing role is important not only to give the proper weight to the employee self-organization interest and to provide the benefit of long experience in assessing the actual risk of disturbances from organizing activities. In performing that task, the NLRB also provides, despite its lack of medical expertise as such, an objective view of the strength of the management interest, based upon both the record in individual cases and upon its cumulative experience with practices in hospitals and other health care institutions.

III

The St. John's Hospital Rule as Here Applied

The Court in *Beth Israel* approved as both rational and consistent with the statute (*Labor Board* v. *Erie Resistor*

> 3. A variety of other fund-raising activities.
>
> 4. Sales and promotion of annuity contracts and other life, automobile, and casualty insurance programs.
>
> 5. Promotion of bazaars, benefits, cookie sales, and the like.
>
> 6. Reduced price sales of tickets.
>
> 7. Promotion of community events.
>
> 8. Employee's personal solicitation for fellow employees. . . .
>
> Equally significant is the distinctive attribute of the hospital's easy accessibility, both physically and attitudinally. The ease with which a stranger may enter any area of most hospitals without being stopped or questioned is astonishing. [Epstein, *Guide to NLRB Rules on Solicitation and Distribution,* 49 Hospitals (Journal of the American Hospital Association) 43, 44-45 (1975).]

Corp., 373 U.S. 221, 235-236), the approach developed by the Board in *St. John's Hospital*, *supra*, and applied in this case—*viz.*, the

> general approach of requiring health-care facilities to permit employee solicitation and distribution during nonworking time in nonworking areas, where the facility has not justified the prohibitions as necessary to avoid disruption of health care operations or disturbance of patient is consistent with the Act. [437 U.S. at 507.]

The concurring Justices, however, called for a "far more sensitive inquiry into the actual circumstances of each case." (*Id.* at 515.) And, the *per curiam* decision in *NLRB* v. *Baylor University Medical Center*, . . . U.S. . . ., 47 L.W. 3298 (Oct. 30, 1978), can be read as limiting the general *Beth Israel* approval of the Board's presumptive approach to cafeterias and like areas:

> The corridors of the hospital serving patients' rooms, operating and treatment rooms, and other areas used by patients and their families were neither involved nor considered by the Court in *Beth Israel*. [47 L.W. at 3298.]

Alternatively, *Baylor* may be read, and more appropriately, we believe, not as a limitation on the general approach apparently approved in *Beth Israel* but, instead, as a simple denial of certiorari upon a basically factual question. (See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491.) For, the Court characterized the decision below in *Baylor* as simply holding that "there was no *substantial evidence* supporting the Board's conclusion that the corridors were not . . . denoted essentially to patient care." (*Baylor*, 47 L.W., at 3298, emphasis supplied.)

We submit that this case demonstrates why the general *St. John's Hospital* approach is well within the Board's prerogative and, in fact, represents the most desirable means for fairly resolving hospital no solicitation/no distribution cases. (Subpart A, *infra*). Further, even upon the case-by-case approach suggested by the concurring Justices in *Beth Israel*, the Hospital in this instance has failed to demonstrate any substantial interference with its legitimate management interests which would justify the broad restrictions imposed. If, however, there is any doubt concerning whether in this instance "the Board was appropriately sensitive to the importance of [the Hospital's] interest in maintaining a tranquil environment for patients" (*Beth Israel*, 437 U.S. at 507), the case should be remanded for more precise factual development, to permit the Board to perform the balancing task anew in a more exacting fashion. (Subpart B, *infra*.)

A. We have already seen that Congress intended, in passing the 1974 Amendments, to give employee self-organization in the health industry the same protection it has long enjoyed in other industries (Part II (A), *supra*), and that, in hospital cases as in others, the basic task of fostering that employee right while taking the employers management interest into account has been entrusted to the NLRB.[25] In performing this task, the Board, of course, "necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions," (*Beth Israel*, 437 U.S. at 501).[26] Thus, if there remains any dispute regarding the

---

[25] Because, in this case, "the activity was carried on by employees already rightfully on the employer's property * * * the employer's management interests rather than his property interests were involved." (*Hudgens*, *supra*, 424 U.S. at 521-522, n. 10; see *Beth Israel*, 437 U.S. at 504-505; *id.* at 515 (Powell, J., concurring); see also *Eastex, Inc.* v. *NLRB*, 437 U.S. 556-573.)

[26] The concurring Justices in *Beth Israel* suggested that the presumption of invalidity in public access areas of hospitals is not entitled to deference because derived from the quite different industrial setting of *Republic Aviation*. We would agree that the transposing of a rule wholesale, where that rule rests in substantial part on an assessment of managerial interests, from an industrial to a health care setting would be unjustified. At the same time, the Board is surely entitled, from the continuing run of hospital cases and from common knowledge concerning hospitals, to draw general inferences covering different areas and situations in such institutions. That is, there does not seem to be anything special

St. John's Hospital approach, that dispute must center not upon whether the Board is entitled to proceed with a presumptive approach to hospital no solicitation/no distribution cases, but whether the actual choice of presumptions for various locations is a rational and appropriate means of striking the required balance.

Since "[t]he place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees . . . [and] banning of that solicitation might seriously dilute § 7 rights" (*NLRB* v. *Magnavox Co.*, 415 U.S. 322, 325-326), the Board is certainly justified in demanding some significant justification before solicitation or distribution is restricted anywhere on the employer's property where employees otherwise have a right to be. Without any such justification, the rule would be "an unreasonable impediment to self-organization and therefore discriminatory." (*Peyton Packing Co.*, 49 NLRB 828, 8444, quoted in *Republic Aviation, supra*, 324 U.S., at 803-804 n. 10.)

In some generic situations the Board has recognized that management interests are usually strong enough to counterbalance employees' communication rights. For example, because "[w]orking time is for work . . . [i]t is within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours." (*Republic Aviation*, 324 U.S. at 803-804 n. 10.)

In *St. John's Hospital*, the Board recognized another generic justification applicable to "strictly patient care" areas of hospitals. The distinction drawn by the Board between "strictly patient care" areas and other areas where patients and visitors may be present, far from being

about hospitals which suggests such great variation from one institution to another as to preclude drawing general inferences about hospitals as a group. And, the exception for strictly patient care areas created in *St. John's Hospital* and applied here shows plainly that the Board has *not* simply carried over an inappropriate rule, but has separately balanced the interests of hospital employers and employees.

arbitrary is entirely reasonable. It is intuitively obvious that a high measure of quiet and employee concentration are required in immediate patient care areas. In contrast, it is just as plain that in other areas of a hospital the natural disorder of passageways [27] and the relaxed atmosphere of gathering places prevails. The norm in such areas is the bustle of movement, the sounds of conversation, radio and television and the sight of people reading or exchanging reading material. All this the Board was plainly entitled, if not, indeed, required, to take into account in determining whether the burden of demonstrating a need to restrict employee communication on union organization should be on the employer.

Thus, from familiarity with the types of activities which typically occur in various public access areas of hospitals, the Board can draw inferences regarding the true need for broad bans upon union organizational activity. (See Part II (B), *supra*.) Indeed, the record in this case illustrates why the real possibility of interference with patients care in areas not immediately devoted to patient care is remote.

[27] One study of hospital life reported the following incidents as typical:

> Three medical students, two interns, the assistant resident, the resident, and the visiting doctor, after making rounds in the ward move out into the hall and continue their discussion near the nurses' station. These eight men block the hallway from wall to wall. A student nurse who wants to go by with a bedpan stands waiting but without giving a sign until after almost a minute when one of the medical students moves without looking at her, and she passes.
>
> • • •
>
> I am invited to join this same group in conference on the steps. The visiting doctor and I are offered chairs; the others sit on the steps. Visiting doctor: 'I'm utterly confused.' Everyone laughs. 'Now let's see how we will proceed. Do you have any hunches on this case? Let's have everybody's opinion. Let's go up the totem pole.' With a smile he points to a medical student. Everyone laughs." [R. Coser, *Life in the Ward* (1962), at 12.]

First, union organizers will typically choose locations in which large groups of off-duty employees are present for their activities; in this instance, those areas were the cafeteria and the parking lot. In such areas, by definition, the employees who are present will be engaged in interchange on all sorts of subjects, with the possibility, at least, of arguments and heated exchanges of opinion. If patients and visitors are permitted in such areas, as they typically are,[28] one must assume that the judgment has been made by the hospital that no significant medical harm will come to them from simply overhearing employees discussing their private concerns, and that general rules concerning unruly behavior by employees are sufficient to prevent real disturbances. And, as both this case and *Beth Israel* illustrate, the Board has been given no reason to conclude either that raucous outbreaks obvious to outsiders are more typical of union organizing activity than of the other activities occurring in the hospital's non-patient care areas, or that patients and visitors will in fact become aware of, much less upset by, normal union solicitation and distribution in areas where the patients and visitors present are not receiving immediate care.

Similarly, it is apparent that exposure to the everyday world is considered wholly compatable with sound patient care. For this reason, presumably, televisions are not only tolerated but supplied, despite the fact that some disturbance is caused. It is also for this reason, it appears, that doctors at Baptist Hospital, taking the risk that some untoward incident will upset the patient, permit pre-operative patients to go off the premises. Obviously, watching television or on a public street, a patient may encounter all sorts of emotionally upsetting incidents—at least as emotionally upsetting as realizing that, like most other people in American society, health care employees are concerned about their wages and working conditions and discuss

[28] Patients, of course, are allowed to leave their rooms and their floors only if their physical condition permits.

among themselves the pros and cons of uniting to improve their suitation. "The tensions of the market place" (*Beth Israel*, 437 U.S. at 509 (Blackmun, J., concurring)), of the international scene, etc., are *not* generally censored out of hospital life. Discussion of the right of hospital employees to organize should not be either.

As to the comparison of public access areas of hospitals to retail stores or public, commercial restaurants, the majority in *Beth Israel* has already demonstrated why the Board was entitled, if not required, to strike a different balance. (437 U.S. at 505-507.) We add that the fundamental character of the areas here at issue for the most part differ fundamentally from retail stores or commercial restaurants. They are areas in which there is much sitting about (lobbies), walking around (parking lots, corridors), and conversation not directly related to the main function of the employer. In contrast, on the selling floor of stores or in the eating area of restaurants, *any* activity not directly related to the service of customers is discouraged. Thus, the analogy to those situations in which the Board has recognized generic justifications is far from precise, and the distinction is well merited.

B. The concurring Justices in *Beth Israel* proposed, as an alternative to a presumption of invalidity in all non-patient care areas, a case-by-case balancing approach, in which the hospital would be required to show "a reasonable possibility of harmful consequences to patients or visitors," (437 U.S. at 515 (Powell, J., concurring)).[29]

[29] The concurring Justices also appeared to give considerable weight to the lack of alternative locations for solicitation and distribution; the majority in *Beth Israel* noted that this consideration "might" be appropriate in the hospital context. While, in this instance as in *Beth Israel*, the Hospital's present rule would have to be overturned even if this criterion were applied (see p. 18, *supra*), we respectfully suggest that this case also shows why such a rule is inappropriate. In *NLRB* v. *Babcock & Wilcox*, 351 U.S. 105, since non-employee activity was at issue, the employer's prop-

Upon this record, neither that showing nor the greater showing required by the *Beth Israel* majority—that the prohibitions are "necessary to avoid disruption of health care operations or disturbance of patients" (*id.*, at 4770)—has been made.

For example, while Baptist, unlike Beth Israel, did introduce testimony by doctors in support of its position, the Board was certainly entitled to reject that testimony as not demonstrating a "reasonable possibility" of harm to patients. For, the doctors, it turned out, were testifying not from personal experience with union solicitation but from imagined disruptions not indicated in the record, and preventable by less restrictive means. And, the Hospital tolerate sources of potential disruption presenting at least as great a likelihood of possible harm as union activity, a circumstances which indicates that the Hospital's October 1974 rule represents not the true medical judgment of the hospital but a balancing of risks inconsistent with national labor policy. (See generally Part I (B), *supra.*)) This indication is confirmed by direct evidence that the October, 1974 rule was adopted without medical consultation; was a response to union organizational activity begun after the passage of the 1974 Amendments; and was not impelled by any actual complaints from patients or visitors. Further, the hospital did not suggest that there was any concern about

erty rights, not managerial rights, were at stake. The issue of available alternatives, then, involved not different areas on the employer's premises, but any area on the premises versus all off-premises communication. Here, in contrast, the Board would have to decide, when faced with an overbroad rule excluding a number of different areas, precisely which excluded areas must be included to permit sufficient employee communication. Such a task, even if within the Board's competence, is so burdensome as not to be worth the candle. (Cf. Bok, *The Regulation of Campaign Tactics in Representation Elections*, 78 Harv. L. Rev. 38, 95 (1964).) For, if no independent showing of a real possibility of harm can be made for a restriction in a particular area, it is hard to see why an employer's interest in patient care is furthered by permitting restriction simply because other areas are available.

physical interference with patient care due to union organizational activity.[30] And, while the Hospital's Employee Handbook did note that employees should be careful about sensitive conversations in such areas as elevators and corridors, there was no attempt to forbid such conversations entirely.[31]

C. This last fact—similar to the circumstance stressed both by the *Beth Israel* majority and the concurring Justices—points toward another possible disposition of this case, if the Board Order is not affirmed outright. Even if a no solicitation/no distribution rule is otherwise valid, it is of course a cardinal principle of the NLRA, embodied directly in the language of § 8(a)(3), that union activity may not be treated *less* favorably than other analogous behavior. And, such discrimination necessarily impeaches any justification offered by the employer for the restriction imposed,[32] and at the same time conveys to employees a message of disapproval, thus defeating the "central purpose, of [§§ 8(a)(1 & 3)] to protect employee self-organiza-

[30] While there were some general references to union solicitation interfering with employees while at work (e.g., Tr. 428), there is, of course, no impediment under the Board's Order to that portion of Baptist's rule forbidding interference with on duty employees.

[31] The Court of Appeals acknowledged that "Both medical witnesses stated that person-to-person solicitation and distribution of literature in the parking lot should have no detrimental effect on patients within the hospital." (Pet. App. 10a.) Yet, although there was also testimony by the Hospital's vice president of personnel services that the Employer's rule, as revised in October, 1974, applied to the parking lot (Tr. 37), the court below "construe[d]" the rule so as not to cover that location. (Pet. App. 11a.) We are aware of no precedent for this procedure of "construing" an employer's rule contrary to its own interpretation so as to avoid entering an order enforceable by contempt. Thus, even on the Court of Appeals' analysis, the judgment below must be reversed to uphold the Board's order to the extent it applies to the parking lot.

[32] In this respect, the anti-discrimination principle governing labor union communication functions similarly to the First Amendment equal protection principle of cases such as *Police Department*

tion . . . from disruptive interference by employers." (*American Ship Bldg.* v. *Labor Board*, 380 U.S. 300, 317; see *id.*, at 316-318). We suspect, from the sort of facts stressed by Mr. Justice Powell in *Beth Israel* that the "far more sensitive inquiry into the actual circumstances of each case" (437 U.S. at 515) which he had in mind would focus largely upon evidence of the consistency of the Hospital's position. For, the *St. John's Hospital* approach, treating alike, as it does *all* no-patient care areas, does not focus upon the particular functions, uses, and expected behavior in specific areas of hospitals. Thus, to this extent, at least until it acquires greater experience enabling it to draw more discrete classifications of areas in hospitals, there is an argument for determinations based upon more particularized, well-developed records.

Toward this end, several labor organizations involved in hospital no solicitation/no distribution cases presently pending before the NLRB, including another affiliate of the Service Employees International Union, recently filed with the Board a Charging Parties' Statement of Position which suggested that such cases be remanded to ALJ's for further factual hearings, before further decision by the NLRB itself. In this Statement, the Unions presented a list of questions deemed pertinent to a sensitive consideration of no solicitation/no distribution cases, focussing upon particular areas of hospitals and upon restriction of activity in each area likely to be similar, in either physical or emotional impact, to labor union activity. We append hereto the list of questions for factual development recommended to the Board and respectfully suggest that, if the Court does not believe the Board, because of its presumptive approach, has met its burden of proof on the present record, it remand the case for the more particular factual development needed if case-by-case proof is required.[33]

v. *Moseley*, 408 U.S. 92, *City of Madison* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167, and *First National Bank of Boston* v. *Belloitti*, 435 U.S. 765, 784-786. For, just as the distinctions based on message conveyed and person speaking in those cases illustrate that any purported neutral justification could not actually have impelled the speech restriction, so here discrimination among functionally similar activity demonstrates an impetus to quash the message because of its content rather than a legitimate, independent reason for restricting the speech. And, as the First Amendment cases illustrate, it is not sufficient for these purposes that activists both for and against a position are banned. Thus, the fact that the Employer in this case did not abide anti-union activity either is entirely beside the point; the justification for the rule is nonetheless impeached if *other* subjects with no less relation to the immediate tasks of the hospital are not banned.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Sixth Circuit should be reversed. Failing that, the judgment below should be vacated and the cause remanded with instructions to remand to the NLRB for further factual development.

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[33] We note that the questions outlined are, obviously, overlapping—that is, most are pertinent not only to the particular areas under which they appear but to other kinds of locations in the hospital as well.

APPENDIX

Excerpts from: Charging Parties' Statement of Position Suggesting a Remand for Further Factual Findings in *Beth Israel Hospital and Massachusetts Hospital Workers Union Local 880, Service Employees International Union, AFL-CIO, et al.*, NLRB Case Nos. 1-CA-11-469, etc.

Particular Questions to be Addressed on Remand

A. Non-Patient Access Areas

1. Does the hospital have any rules restricting the use of any or all of these areas during non-working time? If so, what are they and what is their purpose? Further, are such rules enforced uniformly?

2. Does the hospital have general rules governing what may be discussed in these areas—e.g., are any specific topics forbidden? In particular, are topics which might be termed "solicitation" forbidden—e.g., asking a fellow employee in the course of a conversation to contribute to a charity, to participate in a sports pool? Has the anti-solicitation rule ever been applied to cover such conversations?

B. "Strictly Patient Care Areas"

3. How the area in question is subdivided—for example, patient wards may include patient rooms, lounges or day rooms, and nurse's stations to which patients are not admitted.

4. As to each of the sub-areas delineated under question 3: Is a general attempt made to control noise level? If so, is this done by forbidding, or severely restricting, all conversation, or simply by forbidding noise and actual disturbance? Are the patients and visitors who are present in the area likely to overhear conversations between others which could be upsetting—e.g., political debates, disaster reports, etc., and what attempt is made, if any, to prevent such emotional disturbance? Are televisions and radios likely to

be on? Similarly, are employees forbidden to bring into the area all or some written material, or to pass such material among themselves? Does the hospital pass out employee newsletters or notices, and, if so, are they banned from the area in question? Do employees ordinarily converse in the area regarding aspects of their employment? Do employees discuss the medical condition of specific patients in the area? If so, what steps has the hospital taken to assure that patients are not upset by such conversation?

5. Also as to each of the specific areas delineated under (3) above: Has the solicitation/distribution rule taken on its terms been evenhandedly enforced? For example, are charitable solicitations permitted or encouraged? Does the hospital permit or encourage activity similar in physical intrusion to solicitation or distribution—for example, the circulation of books, magazines, pamphlets, etc., the use of television and radio?

C. Corridors, Elevators and Other Passageways

6. Are the corridors and elevators usual places for off-duty conversations, information exchanges among employees, etc? Are employees forbidden to congregate in the area, if not presently occupied or on immediate call? If so, is the rule enforced—that is, is a patient likely to encounter groups of employees conversing? Is there any evidence of such employee activity constituting a physical impediment to patient care?

7. Are patents and visitors likely to use the corridors for conversations, etc? Are patients and visitors advised that? If so, is there any evidence that activity by patients and visitors has ever impeded the medical care of other patients?

8. Are there differences *among* the corridors and elevators pertinent to the need to keep them clear of extraneous uses? For example, are some corridors and elevators reserved for non-ambulatory patient transportation, or for emergencies? Are some corridors and elevators more likely to be used predominantly by off-duty employees?

D. Public Areas—Lobbies, Gift Shops, Waiting Rooms, Outdoor Grounds, Eating Places

9. Is the area one typically used by employees during their off-duty time to pursue personal concerns, even though patients or visitors are sometimes present? Are there, e.g., employee bulletin boards, hospital posters for employees, or notices of employee events posted in the area?

10. Are newspapers, books, magazines and other media which may contain material which could upset certain individuals available in the area?

11. Is the area used for other solicitation or distribution, whether to patients and visitors or to employees? If material is distributed to employees, is an attempt made to assure that patients do not obtain it, and are the same type of controls applied to distribution of union materials?

Supreme Court, U. S.
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FOR ARGUMENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-223

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
and
LOCAL 150-T SERVICE EMPLOYEES INTERNATIONAL UNION (AFL-CIO),
Intervenor,
v.
BAPTIST HOSPITAL, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT
Baptist Hospital, Inc.

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Section 8(a)(1), 29 U.S.C. 158(a)(1) 2, 7, 9, 10, 14

IN THE

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OCTOBER TERM, 1978

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NATIONAL LABOR RELATIONS BOARD,
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LOCAL 150-T SERVICE EMPLOYEES INTERNATIONAL UNION (AFL-CIO),
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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT
Baptist Hospital, Inc.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 576 F. 2d 107 and reproduced at Pet. App. 1a-12a. The decision and order of the National Labor Relations Board

is reported at 223 NLRB 344 and reproduced at Pet. App. 15a-93a.[1]

JURISDICTION

The order of the Court of Appeals was entered on May 10, 1978 (Pet. App. 13a-14a). The petition for writ of certiorari was filed by the Board on August 8, 1978 and granted on January 8, 1979 (A. 116). The motion to intervene was filed by the Union on January 12, 1979 and granted on March 5, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in concluding on the basis of the record before it that substantial evidence failed to support the Board's finding that the Hospital's no-solicitation rule prohibiting employees from soliciting other employees for any purpose during non-work time in areas of the Hospital which are accessible to patients and their visitors Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1).

---

[1] "Pet. App." refers to the Appendix to the Petition for Certiorari in this case. Reference to the Record appearing in the Appendix to this Court are designated as "A" followed by the page number of the portion of the Appendix specifically referred to in this Brief. For convenience, the Petitioner, National Labor Relations Board, is hereinafter referred to as the "Board"; the Intervenor, Local 150-T, Service Employees International Union, AFL-CIO (the charging party in the unfair labor practice proceedings upon which the Board's order is based) is hereinafter referred to as the "Union"; and the Respondent, Baptist Hospital, Inc., is hereinafter referred to as the "Hospital". The National Labor Relations Act, as amended, 29 U.S.C. §141, *et seq.*, is hereinafter referred to as the "Act". References to the Board's Brief to this Court are designated as "B" followed by the page number of the portion of the Board's Brief referred to in this Brief.

STATUTE INVOLVED

The revelant provisions of the National Labor Relations Act, 49 Stat. 449, 61 Stat. 136, 88 Stat. 395 (29 U.S.C. § 141 *et seq.*) are:

> Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.
>
> Sec. 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

STATEMENT

The Non-Solicitation, No Distribution Rule

The Hospital is a non-profit corporation located in Nashville, Tennessee, where it provides health care facilities and services to the public. It regularly employs between 1800-1900 employees and has a 600-bed patient capacity (Pet. App. 2a, 30a; A. 24; B 3). Consistent with its special responsibility as a medical institution, the Hospital has followed a long-standing practice of emphasizing the importance of "patient care" responsibilities to its employees. At least since 1970, it has been the policy of the Hospital to publish an "Employee Handbook" and to require employees to familiarize themselves with its sum-

mary of the Hospital's personnel policies (A. 7)[2] The Handbook is replete with references to the paramount importance of employee patient care responsibilities. The following are typical of such statements:

> "We exist solely to provide superior medical care to all those needing our services." (A. 83)
>
> "Even casual conversations with other employees may be overheard and thereby violate the right of privacy of others. Be particularly careful about your conversation in elevators, eating places and other places of public assembly within the hospital." (A. 98-99)
>
> "As a hospital employee at Baptist you have high standards to maintain. You are urged, therefore, to refrain from loud talking and laughing, gossiping, needless complaining and any other activity that would be disturbing to the patient or out of place in a hospital." (A. 99)
>
> "Noise deters patient treatment and recovery. It is each employee's obligation to avoid unnecessary noise in the hospital. Speak in a quiet, pleasant tone . . . Employees should be alert for sources of unnecessary noise and to report this promptly to their supervisor." (A. 100)
>
> "Employees are asked to remember that visitors to the hospital are frequently upset and unfamiliar with hospital regulations." (A. 103)

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[2] The Handbook was distributed to all employees following its reprinting in August, 1973, and has been furnished to all persons hired by the Hospital since that date as a part of their orientation program. A blue card captioned "Employee Statement" is included in each Handbook containing the following language:

> "The following statement must be signed by the employee and be on file in the Personnel Department before the first pay check will be issued.
>
> "I have read carefully the Employee Handbook of Nashville Baptist Hospital and I understand that I am governed by it. . . ." (A. 114).

Also included in this Handbook is a no-solicitation rule demonstrating similar concern for patient care:

> "Solicitors—In order to protect employees from any form of solicitation, raffle, charity drives, etc., it is strictly prohibited for anyone to solicit patients or visitors while on hospital premises without written approval from Administration. Violation of this policy will subject employee (sic) to disciplinary action. Employees who discover persons making unauthorized solicitation should report this immediately to their Supervisor." (A. 102)

In addition to the rule prohibiting *anyone* from soliciting *patients* or *visitors* while on Hospital premises, the Hospital also had a long-standing past practice prohibiting *employees* from engaging in any type of solicitation of *other employees* in those areas of the Hospital accessible to the public. Witnesses presented by the Hospital and the Board's General Counsel, including the alleged discriminatee Clyde Russell French, uniformly acknowledged this past practice (A. 21, 24, 69, 70-71). General Counsel's witness Jessie Lee White described two separate incidents in which she had observed Hospital officials enforcing this policy by halting solicitation of employees in the Hospital cafeteria (A. 70-71).[3] While this rule was designed "primarily to keep salesmen out of the Hospital" (A. 30), the rule, as applied and as explained in orientation sessions, also proscribed employee solicitation during work time or in such areas as the public cafeteria.

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[3] The two incidents described involved an Avon saleswoman and car saleswoman attempting to solicit employees in the Hospital's main cafeteria. It is clear from the record that the soliciting Avon saleswoman was also an *employee* of the Hospital (A. 70). This testimony directly refutes the finding of the Administration Law Judge that the Hospital's no-solicitation rule, which had existed prior to the advent of the Union, applied only to outside "*salesmen*" and not to "*employees*" of the Hospital (ALJ Decision, Pet. App. 72a-73a).

Anticipating pending changes to the National Labor Relations Act,[4] the Hospital retained legal counsel "several months" prior to August 25, 1974, when the revisions went into effect. The purpose of this action was to obtain review of *all* of the Hospital personnel policies and procedures to insure their compliance with the Act (A. 21-22). It is emphasized that review of such policies including the Hospital's no-solicitation rule commenced "several months" before August 25, 1974. The record shows that the Hospital's management did not become aware of the Union's organizational campaign until the middle of August, 1974 (A. 3-4.)[5]

Hospital management officials advised its legal counsel that the Hospital had consistently enforced a long-standing rule which prohibited all forms of solicitation by employees in those areas of the Hospital accessible to the public. Counsel was further advised that the Hospital had permitted employees to engage in solicitation in various areas of the Hospital which were off-limits to the public. After conferring with Hospital officials and after thoroughly reviewing the Employee Handbook, counsel advised the Hospital that the no-solicitation and no-distribution rules, which as a matter of past practice had

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[4] The Act was amended effective August 25, 1974, to extend its protection to employees of non-profit hospitals. Public Law 93-360, 93rd Congress, 2d Session, July 26, 1974, 88 Stat. 395.

[5] Vice President W. T. Victory's testimony that the "change" in the Hospital's no-solicitation rule was prompted by the Union organizational campaign (A. 6) should be read in this context. The Hospital does not deny that its awareness in mid-August, 1974, that there was a union organizational drive underway contributed to its decision to clarify the no-solicitation rule that was published in the Employee Handbook. It insists, however, that this clarification was undertaken in the context of a comprehensive review of its labor relations policies resulting from the Hospital's imminent inclusion under the Act. It also insists that the posting of the "new" rule on October 4, 1974, did not affect its long-standing no-solicitation policy. The posting of this rule only amended the formally promulgated rule in the Employee Handbook to conform with this long-standing policy.

been in effect for some time, should be *clarified* in writing and posted for the Hospital's employees to read (A. 21-24). As a result of these conferences with its legal counsel, the Hospital promulgated the following rule on October 4, 1974:

> "The solicitation and distribution policy of Baptist Hospital has been revised. This has been done to help protect the privacy and rights of employees as well as to help maintain a good working environment and appearance throughout the hospital. The policy is as follows:
>
> "*No solicitations of any kind, including solicitations for memberships or subscriptions, will be permitted by employees at any time, including work time and non-work time in any area of the Hospital which is accessible to or utilized by the public. Anyone who does so will be subject to disciplinary action.* In those work areas of the Hospital not accessible to or utilized by the public, no solicitation of any kind, including solicitations for memberships or subscriptions, will be permitted at any time by employees who are supposed to be working, or in such a way as to interfere with the work of other employees who are supposed to be working. Anyone who does so and thereby neglects his work or interferes with the work of others will likewise be subject to disciplinary action.
>
> "No distributions of any kind, including circulars or other printed materials, shall be permitted in any work area at any time." [Emphasis supplied] (A. 75; B. 4-5; Pet. App. 2a-3a)

The emphasized part of this no-solicitation/no-distribution rule is the portion which the Board contends and the Administrative Law Judge and Board held violates Section 8(a)(1) of the Act (B. 14-22; Pet. App. 16a, 22a, 63a, 76a, 89a). As found by the Board's Administrative Law Judge and as re-

flected in the Board's Brief to this Court, the Board does not allege to be unlawful the prohibition of solicitation during working time in work areas which are not accessible to or utilized by the public, or the prohibition against the distribution of literature of any kind in any working area at any time (Pet. App. 63a; B. 14-22).

In discussing the application of the disputed portion of this rule, the Hospital's Vice President for Personnel Services, W. T. Victory, explained that employees are prohibited from soliciting other employees for any purpose in any area of the Hospital which is open to the public (A. 8-20). He emphasized that patient care considerations were the primary concern motivating the Hospital to adopt this no-solicitation policy immunizing patients and their families from the often disturbing distractions associated with any form of solicitation (A. 5-6, 12). Two medical experts testified in support of the Hospital's rule emphasizing the medical importance of avoiding subjecting patients and their families to the potentially disturbing distraction of union solicitation (A. 38-46, 51-65). Mr. Victory also emphasized that this rule was applied equally to solicitation of any form, including car salesmen, collection agencies and insurance men, in addition to union organizers (A. 9). He noted in particular that the no-solicitation policy was equally applicable to the Hospital's management representatives in their efforts to encourage employees not to support the Union (A. 27-28).

Among the controversial "public access" areas of the Hospital where solicitation is prohibited under the rule are the gift shop, the main cafeteria (which is open to the public), the lobbies, public restrooms, entrances, and sidewalks leading to the entrances of the Hospital (Pet. App. 35a-36a; A. 8-11, 13-16). Solicitation is permitted in areas of the Hospital which are closed to the public and which are not being used as "work" areas. Such areas include some 26 nurse's stations lo-

cated throughout the Hospital,[6] an equal number of utility rooms similarly dispersed throughout the Hospital, the Hospital's maintenance building, the employees' lounge in the laundry building, and the employees' lounge on the fourth floor of the Hospital's main building (Pet. App. 36a-37a; A. 8-9, 16-19, 25-26).

The Board's Decision

In his decision issued August 26, 1975, the Board's Administrative Law Judge found and concluded *inter alia* that the Hospital had violated Section 8(a)(1) of the Act by promulgating and maintaining the aforementioned no-solicitation rule which prohibited employees from soliciting for the Union during their non-work time in non-work public areas of the Hospital. In so holding the Administrative Law Judge concluded that the "special circumstances" shown by the Hospital were insufficient to warrant a departure from the Board's general policy of finding violative no-solicitation rules on non-work time (Pet. App. 63a-76a, 89a).[7] The Board in its decision and order issued March 26, 1976, adopted the findings of the Administrative Law Judge that the no-solicitation rule in question

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[6] The decision of the Board's Administrative Law Judge contains a footnote which suggests confusion over the Hospital's allowing solicitation in the nurses' stations (Pet. App. 36a, fn. 3). Whatever confusion appears in the testimony of Mr. Victory the fact remains that, as written and enforced, the Hospital's no-solicitation rule clearly permits such solicitation. The rule proscribes solicitation in *"work areas"* by an employee who is *supposed to be working or in such a way as to interfere with the work of other employees who are supposed to be working."* Since nursing stations and utility rooms are not accessible to the public and are utilized by employees *during breaks* (A. 26), there is nothing inconsistent in permitting solicitation in these areas *during such break intervals.* This is precisely the Hospital's policy.

[7] In holding the no-solicitation rule invalid the Administrative Law Judge relied upon the Board's decision in *Summit Nursing Home, Inc.*, 196 NLRB 769 (1972), enforcement denied 472 F. 2d 1380 (6th Cir. 1973) (Pet. App. 6a-7a, 73a-74a).

violated Section 8(a)(1) of the Act for the reasons set forth in its decision in *St. John's Hospital & School of Nursing*, 222 NLRB 1150 (1976), enforced in part and denied in part, 557 F. 2d 1368 (10th Cir. 1977) (Pet. App. 16a, fn. 2, 22a). The Board's order required the Hospital to cease and desist from promulgating, maintaining in effect, enforcing or applying a rule or regulation "prohibiting its employees from soliciting on behalf of any labor organization during their non-work time in any area of its hospital other than immediate patient care areas." (Pet. App. 24a, 90a).

The Court of Appeals Decision

The Sixth Circuit Court denied enforcement of the Board's order as it pertained to the Hospital's no-solicitation rule (Pet. App. 13a-14a). The Court held that the Board was not warranted in finding the Hospital in violation of Section 8(a)(1) of the Act by promulgating and maintaining a rule which prohibits employees from soliciting for a union during their non-work time in areas of the Hospital other than "immediate patient care areas", including the gift shop, lobbies and main cafeteria that are open to employees, visitors and, with some exceptions, to patients. Circuit Judge Lively, writing for the court, discussed the uncontradicted medical testimony concerning the necessity for such a broad rule and he observed:

> "In ordering that the ban against solicitation by non-working employees in the present case be limited to areas of 'immediate patient care' the Board in effect held that the hospital had proven 'special circumstances' only in relation to those areas. The proof is otherwise. *Three witnesses emphasized the fact that many patients, though hospitalized for serious illnesses, are permitted to move freely through public areas of the hospital.* Ambulatory patients are permitted to visit with their families and friends in the lobbies and public lounges. They are free to visit the gift shop and, with a doctor's permission, to eat in the public cafeteria. *These witnesses, two physicians and an experienced hospital administrator, repeatedly referred to the necessity of creating and maintaining a tranquil atmosphere throughout the hospital for patients and visitors.* The testimony of the medical witnesses related this requirement directly to the well-being of the patients. *The witnesses made no distinction between areas of immediate patient care and other areas of the hospital.* Dr. Ricketson stated that patient care is the only purpose of the hospital, and anything which interferes with patient care should be forbidden." (Emphasis added) (Pet. App. 7a-8a).

The Sixth Circuit Court declined to follow the reasoning of the courts of appeals in *Lutheran Hospital of Milwaukee, Inc. v. NLRB*, 564 F. 2d 208 (7th Cir. 1977) and *NLRB v. Beth Israel Hospital*, 554 F. 2d 477 (1st Cir. 1977), prior decisions which enforced Board orders limiting a hospital's right to ban solicitation and distribution to "immediate patient care areas", and the court said:

> *"In the setting of a modern general hospital it is difficult to define the areas of immediate patient care.* One of the medical witnesses in the present case referred to the importance of the psychological attitudes of patients. *A patient's attitude toward the hospital and the likelihood of receiving expert care while there depends in part on whether he perceives the staff as concerned exclusively with patient care.* This need for professionalism was not limited by the witness to doctors and nurses, but was set forth as a requirement for all employees. *Both physican witnesses testified that any activity within the hospital involving volatile or hostile discussion of any subject whether observed by patients or related to them by visiting family or friends, would be detrimental to their well-being.* There is no evidence in this case to justify an immediate patient

care area limitation on the no-solicitation rule." (Emphasis added) (Pet. App. 8a).

Instead, the Sixth Circuit Court accepted the basic reasoning of the appellate courts in *St. John's Hospital and School of Nursing, Inc. v. NLRB*, 557 F. 2d 1368 (10th Cir. 1977) and *Baylor University Medical Center v. NLRB*, 578 F. 2d 351 (D. C. Cir. 1978) as correct (Pet. App. 8a-9a). The Court observed that the First Circuit in *NLRB v. Beth Israel Hospital, supra*, held that the hospital failed to sustain its burden of showing that special circumstances justified a ban on employee solicitations in a cafeteria and coffee shop; whereas, in the instant case the record ". . . contains uncontradicted testimony that these areas are part of the total environment of the hospital where the medical needs of patients are served by maintaining a climate free of strife and controversy." (Pet. App. 10a). Finally, the Court noted that there are numerous locations, including employees' lounges, utility rooms, nurses' stations, rest rooms and parking lot, which are open to solicitation, thus providing Hospital employees with the opportunity to exercise their rights under Section 7 of the Act (Pet. App. 10a-11a).

SUMMARY OF ARGUMENT

In *Beth Israel Hospital v. NLRB*, 437 U. S. 483 (1978), 98 S. Ct. 2463, 57 L. Ed. 2d 270, the Court held that union solicitation of employees by other employees could not be prohibited by a hospital in its public cafeteria and coffee shop during non-working time unless the hospital was able to show that the prohibition of such activity is necessary to avoid disrupting health care operations or disturbing hospital patients. However, this decision was limited to the particular record before the Court in *Beth Israel* and did not establish a hard and fast rule to be applied in all future hospital no-solicitaton rule cases.

It is submitted that there are a number of factual differences that distinguish the instant case from *Beth Israel*. For example, contrary to *Beth Israel* where the hospital offered no affirmative evidence to establish the necessity for its broad no-solicitation rule, the record in the present case contains uncontradicted expert medical testimony that the rule is necessary in patient-access areas at Baptist Hospital in order to shield patients and their visitors from the potentially disturbing effects of various forms of solicitation. Baptist Hospital has a responsibility to create an atmosphere for its patients free of potential strife and controversy, and this goal clearly can not be accomplished if employees are free to solicit in those areas of the hospital which are accessible to ambulatory patients and their visitors (e.g. public cafeteria, lounges, corridors, elevators, etc.). This uncontradicted medical testimony establishes the necessity for a broad no-solicitation rule in the patient-access areas of the Hospital as the Circuit Court correctly concluded.

Another significant difference distinguishing this case from *Beth Israel* is the uncontradicted fact that patients and their visitors constitute about 32 percent of the cafeteria's patrons on weekdays and about 53 percent on weekends, which is considerably higher than the non-employee usage statistics shown in the record in *Beth Israel* that the Court deemed to be of "critical significance" 57 L. Ed. 2d at 386. This would indicate that the Baptist Hospital cafeteria is a more typical patient-relative oriented cafeteria than the one at *Beth Israel*, which has been likened to an industrial plant's employees cafeteria, 57 L. Ed. 2d at 391. Therefore, the potential for patient and visitor exposure to the disquieting effects of solicitation in the Baptist Hospital cafeteria is much greater.

In *Beth Israel* the Court noted that there were "relatively few places" where employees could meet on hospital premises for the purpose of discussing unions or other matters besides the hospital cafeteria. 57 L. Ed. 2d at 379. Such is not the

case at Baptist Hospital as the record clearly reflects. The Sixth Circuit Court expressly found that Baptist Hospital has a "large number of areas which are closed to patients and the public where the no-solicitation rule does not apply." (Pet. App. 10a). The Board ignored these alternative channels for employee communications in reaching its decision that the Hospital's no-solicitation rule is invalid *per se*.

Moreover, unlike *Beth Israel*, there is no evidence in the record in this case that the Hospital has permitted the use of its cafeteria for other types of solicitation, including fund drives, or that the Hospital has adopted a less restrictive approach to behavior in the cafeteria which would be at least as disquieting to patients as union solicitation. On the contrary, the record evidence shows that the Hospital has consistently enforced its no-solicitation policy by preventing other forms of solicitation in its cafeteria (e.g., Avon saleswoman and car saleswoman), and has not allowed its management staff to engage in anti-union conversations with employees in this or other patient-access areas.

It is submitted that the Hospital has shown special circumstances in this case that justifies the promulgation and maintenance of a no-solicitation rule prohibiting its employees from soliciting other employees during non-work times in those areas of the hospital that are accessible to patients and their visitors. Accordingly, the Sixth Circuit Court was correct in concluding that substantial evidence in the record failed to support the Board's finding that the Hospital violated Section 8(a)(1) of the Act.

ARGUMENT

The Hospital Has Shown Special Circumstances That Justify Its Broad No-Solicitation Rule Prohibiting Employees From Soliciting Other Employees During Non-Work Times in Non-Work Areas Which Are Accessible to Patients and Their Visitors.

The Board argues in its Brief that the decision of the Supreme Court in *Beth Israel Hospital v. NLRB*, 437 U. S. 483 (1978), 98 S.Ct. 2463, 57 L. Ed. 2d 370, resolves all the issues raised in the instant matter and that said decision is fully applicable and controlling herein (B. 12-22). We submit that such is not the case since there are several significant differences that clearly distinguish this case from *Beth Israel*.

Generally, in *Beth Israel* the Court ruled that union solicitation could not be prohibited by a hospital during non-working time in non-working areas which are accessible to patients and the public as well as employees (i.e., cafeteria and coffee shop) unless the hospital shows that the prohibition of such activity is necessary to avoid disrupting health care operations or disturbing patients. In accordance with *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), the Court majority held that the burden was on the hospital to show that special circumstances justified banning solicitation in the cafeteria since it was a "natural gathering place for employees."[8] In his opinion for the Court in *Beth Israel* Mr. Justice Brennan carefully emphasized, however, that the Court was limiting its decision to the

[8] Unlike *Beth Israel*, however, where only that portion of the hospital's no-solicitation rule prohibiting employees from soliciting other employees even during non-working time *in the hospital's eating facilities* was before the Court, in the instant case Baptist Hospital's full no-solicitation rule banning employees from soliciting other employees in *any* area of the hospital which is accessible to patients or their visitors including such areas as corridors, elevators, lobbies, gift shop, as well as public cafeteria, etc. is squarely before the Court.

particular record before it and that it was in no way sanctioning perfunctorily an *a priori* analysis by the Board in other hospital no-solicitation rule cases. The Court's opinion concludes:

> "We therefore hold that the Board's general approach requiring health-care facilities to permit employee solicitation and distribution during non-working time in non-working areas, *where the facility has not justified the prohibitions as necessary to avoid disruption of health care operations or disturbance of patients,* is consistent with the Act. We hold further that, with respect to the application of that principle to petitioner's cafeteria, the Board was appropriately sensitive to the importance of petitioner's interest in maintaining a tranquil environment for patients . . . The Court of Appeals did note, however, that the Board's guidelines are still in flux and are far from self-defining, concluding and *we agree, that*:
>
> > 'the Board [bears] a heavy continuing responsibility to review its policies concerning organizational activity in various parts of hospitals. Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial setting with which the Board is more familiar. The Board should stand ready to revise its rulings if future experience demonstrates that the well-being of patients is in fact jeopardized.' " (Emphasis added)
>
> 57 L. Ed. 2d at 389-390.

The concurring opinions of Mr. Justice Blackmun (joined by Mr. Chief Justice Burger and Mr. Justice Rehnquist) and Mr. Justice Powell (joined by Mr. Chief Justice Burger and Mr. Justice Rehnquist) also clearly emphasize the narrowness of the Court's holding as based upon unique circumstances at ***Beth Israel Hospital,*** 57 L. Ed. 2d 390-396. Sounding a note of caution Mr. Justice Blackmun said in his concurring opinion:

> The tenor of the Court's opinion and of the Board's approach concerns me. *There are many hospital coffeeshops and cafeterias that are primarily patient and patient-relative oriented, despite the presence of employee-patrons, far more so than this very restricted Beth Israel operation, that seems akin to a manufacturing plant's employees cafeteria.* I fear that this unusual case will be deemed to be an example for all hospital eating-facility cases, and that the Board and the courts now will go further down the open-solicitation road than they would have done, had a more usual hospital case been the one first to come here. *Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family—irrespective of whether that patient and that family are labor or management oriented —need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed.*
>
> I entertain distinct doubts about whether the Board, in its preoccupation with labor-management problems, has properly sensed and appreciated the true hospital operation and its atmosphere and the institution's purpose and needs. I earnestly share the caveat pronounced by the Court of Appeals, and reproduced by the Court in the next to the last paragraph of its opinion, ante, pp. . . ., and I sincerely hope that the Board bears that heavy responsibility in mind when it considers other hospital cases that come before it for decision. (Emphasis added)
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> 57 L. Ed. 2d at 390-391

The function of the Board, according to the majority opinion in ***Beth Israel,*** is to balance conflicting legitimate interests to

effectuate fundamental national labor policy, 57 L. Ed. 2d 385-386. In cases that affect the health care industry the conflicting interests are, on the one hand, the hospital's desire to protect its patients from disturbance and, on the other, the union's desire to organize the hospital's employees. As noted by Mr. Justice Brennan "it may be [in the health care field] that the importance of the employer's interest here demands use of a more finely calibrated scale." 57 L. Ed. 2d at 388. The Board itself has concluded that the special characteristics of hospitals justify a rule different from that which the Board generally applies to other employers. *St. John's Hospital & School of Nursing, Inc.*, 222 NLRB 1150 (1976), enforced in part and denied in part, 557 F. 2d 1368 (10th Cir. 1977).[9] Nevertheless, despite earlier views to the contrary, [10] the Board has in *St. John's* and subsequent cases concluded that the balance should be struck against hospital bans on employee

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[9] The Board said in *St. John's* at 1150:

> *"We recognize that the primary function of a hospital is patient care and that a tranquil atmosphere is essential to the carrying out of the function. In order to provide this atmosphere, hospitals may be justified in imposing somewhat more stringent prohibitions on solicitation than are generally permitted.* For example, a hospital may be warranted in prohibiting solicitation even on nonworking time in strictly patient care areas, such as the patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas. Solicitation at any time in those areas might be unsettling to the patients—particularly those who are seriously ill and thus need quiet and peace of mind." (Emphasis added)

[10] In *Guyan Valley Hospital*, 198 NLRB 107 (1972), the Board said at 111:

> [I]t must be remembered that Respondents facility is not a manufacturing plant, it is a hospital. And it is in the nature of hospitals that certain of the working areas (hallways, elevators, stairs, patient's rooms, gift shops, etc.) are necessarily open to the use of the patients and visitors . . . Further, the hospital services ill individuals who, in their weakened condition may readily be upset if they overhear anti-union/pro-union arguments . . .

solicitations during non-work times in areas other than "immediate patient care areas", such as lounges and cafeterias, absent a showing that disruption would necessarily result if solicitation was permitted in these areas.[11] The Board has consistently defined "immediate patient care areas", where solicitation may be prohibited, as "patients' rooms, operating rooms and places where patients receive treatment such as X-ray and therapy areas." All other areas accessible to patients and their visitors, according to the Board's present policy, are open to unrestricted employee solicitation during non-work time since the "possibility of any disruption in patient care resulting from solicitation or distribution of literature is remote." 222 NLRB at 1151. However, it is submitted that in the instant case the Board has failed to strike the proper balance between conflicting legitimate interests since, unlike an industrial setting, it is not the non-profit hospital but rather its patients whose interests are in conflict with those of the hospital employees. See *Baylor University Medical Center v. NLRB*, 578 F. 2d 351, 354, fn. 23 (D.C. Cir. 1978), affirmed in part and remanded in part, — U.S. — (1978), 58 L. Ed. 2d 202.

On the basis of the record before the Board in *Beth Israel* the Supreme Court held that the Board had correctly evaluated the relative strengths of the competing interests and considered all factors appropriately to be taken into account. However, the record in *Beth Israel* differs in several material respects from the record before the Board in the case *sub judice*.

For example, among the significant differences distinguishing this case from *Beth Israel* is the fact that the main cafeteria in Baptist Hospital is a far more typical "public" cafeteria rou-

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[11] See, e.g. *St. Peter's Medical Center*, 223 NLRB 1022 (1976); *Beth Israel Hospital*, 223 NLRB 1193 (1976); *Lutheran Hospital of Milwaukee*, 224 NLRB 176 (1976); *Baylor University Medical Center*, 225 NLRB 771 (1976); *St. Joseph Hospital*, 228 NLRB 158 (1977).

tinely utilized by employees, patients and their visitors alike. Moreover, unlike *Beth Israel* there is no evidence in the instant record suggesting that as few as 1.56 percent of the cafeteria's patrons are patients while only an additional 9 percent are visitors. These statistics were characterized as being of "critical significance" by Mr. Justice Brennan in the majority opinion for the Court in *Beth Israel,* 57 L. Ed. 2d at 386. On the contrary, Vice President Victory testified that the Hospital did a study at its counsel's request to determine the percentage of non-employees that used the main cafeteria, and this study showed that on a weekday about 32 percent of the people using the cafeteria during meal periods were non-employees and that on a week-end about 53 percent were non-employees (A. 27, 36-38). Thus, it is apparent that there is substantially greater usage of the main cafeteria by patients and visitors at Baptist Hospital than was shown in the record before the Board in *Beth Israel.*[12] Moreover, the expert medical testimony that was introduced in this case emphasized the Hospital's policy of encouraging controlled mobility among patients at the hospital thereby suggesting a greatly different pattern of cafeteria utilization at Baptist Hospital than existed in *Beth Israel* (A. 54-56, 63-65).

Further distinguishing the cafeteria situation at Baptist Hospital is the fact that there is no comparable evidence in the instant case suggesting that the Hospital's cafeteria constitutes

[12] In its Brief the Board valiantly attempts to downplay the significance of the study figures showing substantial patient and visitor usage of the main cafeteria at Baptist Hospital by arguing that the study was based on a count of employees wearing identification pins who went through the serving lines during meal periods and, further, that the study would not have included employees who brought their own lunches, used the vending machines, or made no purchases (B. 7, fn. 7, 15, fn. 15). However, the Board ignores the fact that the percentage of employees going through the cafeteria serving lines during meal periods is undoubtedly *higher* than at other times since employees wearing their identification pins are entitled to a 25 percent discount on all purchases made (A.26).

the "natural gathering place" for the Hospital's employees during their non-work time. Indeed, unlike *Beth Israel* where the Court accepted the Administrative Law Judge's finding that there were "relatively few places where employees could congregate or meet on hospital grounds or in the nearby vicinity for the purpose of discussing non-work related matters other than the cafeteria" (57 L. Ed. 2d at 379), the Sixth Circuit expressly found that Baptist Hospital still has a "large number of areas which are closed to patients and the public where the no-solicitation rule does not apply" (Pet. App. 10a). Those areas include several employee lounges which contain vending machines, 28 utility rooms, 26 nurses' stations and those rest rooms which are restricted to employee use only (Pet. App. 3a; A. 8-9, 16-19, 25-26). Clearly, the employees have ample opportunity to discuss possible union organization in these other areas of the hospital, and the Sixth Circuit Court aptly noted that there was uncontradicted testimony in the instant record indicating that employees have openly solicited for a union in these areas without interference by the Hospital (Pet App. 3a-4a; A. 26).[13] Significantly, the Board in its determination that the Hospital's no-solicitation rule is invalid did not even consider these other areas where employees could solicit and organize during non-work time, even though this Court has sug-

[13] In its Brief the Board argues that these other areas of the hospital are *not adequate* for the effective exercise of the employees' organizational rights in that the lounge in the laundry building is not easily accessible to most of the 1800 employees, whereas the other lounge or dining area located on the fourth floor of the central building is too small and is used primarily by surgical personnel. With regard to the numerous nurses' stations and utility rooms available, the Board contends that relatively few employees take their breaks in these areas and bases this conclusion on the testimony of two out of 1800 employees (B. 21). Actually, the Board is assuming facts not in the record since there is no evidence that the majority of the Hospital's employees go to the main cafeteria during their relief periods rather than utilize these lounges, utility rooms, etc. located throughout the hospital. In addition, the Board's argument ignores the fact that solicitation and distribution are permitted in the adjacent parking lot so long as it does not "create a nuisance" to others (Pet. App. 10a-11a).

gested that the Board should consider whether a union and its supporters have available alternative channels for communications to employees *NLRB v. United Steelworkers of America*, 357 U.S. 357, 364 (1958).

Additional factors distinguish the record in the instant case. In *Beth Israel* the Court emphasized how the hospital had ignored its asserted fears and utilized its cafeteria for other types of solicitation unrelated to unionization. Mr. Justice Brennan noted:

> "Petitioner has itself recognized that the cafeteria is a natural gathering place for employees on non-working time, for it has used and permitted use of the cafeteria for solicitation and distribution to employees for purposes other than union activity. For example, *petitioner maintains an official bulletin board in the cafeteria for communicating certain messages to employees.* On occasion it has set up special tables in or near the cafeteria entrance to aid solicitation of contributions for the United Way or United Fund charities, the Jewish Philanthropies Organization Drive, the Israel Emergency Fund, and to recruit members for the credit union. When petitioner embarked upon an intensive cost reduction program, styled "Save a Buck a Day" or "BAD", it used the cafeteria to post banners and distribute informational literature touting the program to employees, and significantly, generally did not use the locker and rest rooms for this purpose. *In addition to these official uses, petitioner maintains an unofficial bulletin board in the cafeteria for the employees' use, a rack and small table which display commercial literature, such as travel brochures, and information of interest only to employees, such as car-pool openings.*" (Emphasis added)
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> 57 L. Ed. at 379

There is no such showing in the instant record. Similarly, in *Beth Israel* the Court noted evidence indicating that the

hospital had at one time "permitted limited union solicitation in the cafeteria without untoward effects" 57 L. Ed. 2d at 386. In the case *sub judice* the record includes uncontradicted testimony by one of the Board's own witnesses (French) acknowledging that his union solicitation had already resulted in untoward incidents involving open expressions of hostility between employees for and against a union (A. 66-68).[14]

The Court in *Beth Israel* also noted that there was "cogent" evidence indicating that the hospital had previously confined its concern that patients might overhear employee cafeteria conversations that could be potentially disquieting to simply cautioning its staff to "restrict the voicing of your clinical discussion to include none other than your intended audience." 57 L. Ed. 2d 386-387, fn. 20. In the instant case the record not only fails to include any similar showing but the evidence is undisputed that Baptist Hospital further substantiated the sincerity of its concern that patients might be exposed to the disconcerting themes of union solicitation by also prohibiting its management staff from engaging in anti-union conversations in these same areas where they might be overheard by patients or their visitors (A. 27-28).

Finally, and perhaps most significantly, contrary to *Beth Israel* where the hospital offered no affirmative evidence to substantiate the necessity for its no solicitation rule, the record in the instant case includes highly pertinent and wholly uncontradicted expert testimony supporting the medical necessity for the no-solicitation rule at Baptist Hospital (A. 39-43, 52-60). As summarized in the Sixth Circuit Court's decision:

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[14] The Board deems these two incidents as insignificant since neither resulted in any type of "disturbance" (B. 18, fn. 19). It is submitted, however, that the lack of a disturbance during these cafeteria incidents should not be controlling since it is the *content* of the overheard conversations that would tend to be disquieting to patients or visitors and not necessarily the noise level of the conversations.

"Two members of the medical staff of the hospital testified. Both were experienced physicians and engaged in private practice. Dr. Russell T. Birmingham testified that it was important to shield patients from emotional problems because the attitude of a patient and the patient's family have 'a great deal to do with the recovery' of the patient. The witness stated that the need to maintain a tranquil atmosphere is not limited to treatment areas, since patients are permitted to move around in all areas of the hospital. If the union activity should become 'volatile or hostile in any form' it was Dr. Birmingham's opinion that such activity would have a potential for affecting patients and their families adversely.

Dr. Greer Ricketson testified that any 'non professional attitude' among hospital employees is upsetting to patients. He stated that patients and their families are disturbed when people who are supposed to be taking care of them seem to have their minds on other things. The witness, who was chief of the medical staff of the hospital at the time of the hearing, stated emphatically that the rule and the reasons for the rule apply equally to all solicitations. Explaining the need for a rule which covers the entire working and public access areas of the hospital, Dr. Ricketson referred to the present-day mobility of patients and the fact that an event which disturbs the visiting family invariably gets back to the patient.

No evidence was introduced which contradicted in any way the testimony of the two doctors that important medical reasons exist for maintaining the no-solicitation rule of the hospital." (Emphasis added) (Pet. App. 4a-5a)

Therefore, even accepting the Board's premise in the instant case that the Supreme Court's decision in *Beth Israel* requires a hospital to justify a no-solicitation rule extending beyond "immediate patient care areas" of the hospital, this totally

unrefuted expert medical testimony establishing the necessity for such a rule, which is not found in the record in *Beth Israel*, clearly satisfies this burden in the instant case.

In this and similar cases involving hospital no-solicitation rules the Board takes little notice of the fact that a hospital has a responsibility to create an atmosphere free of potential disruption and trauma. Surely, patients that are diseased, weak and, in some cases, emotionally upset have rights which are paramount in any consideration of a hospital no-solicitation rule's validity. It seems inconceivable that such patient rights should be considered inferior to those of retail store or restaurant customers. Mr. Justice Powell in his concurring opinion in *Beth Israel* stated:

> "In my view, the presence of patients and members of the public in the hospital cafeteria removes the case from the framework established in Republic Aviation, just as the presence of customers has that effect in the Board's retail establishment cases. *The hospital's function in serving patients, their families, and visitors is much like the retail establishment's function in serving its customers. That a nonprofit hospital does not share the profit motive of a retail establishment does not diminish the hospital employer's professional concern for the welfare of those in its care, including not only patients but also their friends and relatives who come to visit.*
>
> It is true that the hospital's primary function is carried out in the immediate patient care areas, just as the retail establishment's main function is carried out on the selling floor. But the Board has applied its retail store rules to public restaurants on the premises of the retail store, see ante, p. . . ., 57 L. Ed. 2d 393, notwithstanding the fact that the primary selling function does not take place there. Public restaurants in retail stores are provided for some of the reasons that hospitals maintain public eating places—

including the convenience of the establishment's patrons. In addition, *a hospital's more general purpose extends to, and pervades, all areas of the hospital to which the public has access; it is not limited narrowly to the provision of technical medical treatment.* Part of the hospital's function is to provide a 'total environment . . . where the medical needs of patients are served by maintaining a climate free of strife and controversy." NLRB v. Baptist Hospital, Inc., 576 F. 2d 107, 110 (CA6, 1978). *In this respect, the Board should take greater account of the impact of solicitation in this sensitive area than it does with respect to retail establishments.* A presumption developed in and geared to the context of industrial establishments, which the Board has declined to apply to retail stores, simply has no relevance to hospitals." (Emphasis added)

47 L. Ed. 2d at 393-394

The Circuit Court Properly Concluded That Substantial Evidence in the Record Failed to Support the Board's Conclusion That the Hospital Had Not Justified the Need for a Broad No-Solicitation Rule.

Baptist Hospital is not an industrial plant. It is a hospital—and its hallways, elevators, cafeteria, stairs, lobbies and gift shop are necessarily open to the use of patients and visitors.[15] To fully appreciate the trauma that is experienced in this or any general hospital on a daily basis, one must, perhaps, experience the misfortune of taking a loved one to an emergency room in very serious condition. One who has done so can fully understand the fear and anxiety that all patients and

[15] In *St. John's Hospital & School of Nursing v. NLRB*, 557 F. 2d 1368, 1375 (10th Cir. 1977), the court held that the Board's definition of "strictly patient care areas" must be interpreted to include such areas as halls, stairways, elevators and waiting rooms accessible to patients.

families are subjected to during a medical crisis. Both the families and the patients are "on pins and needles" as Dr. Ricketson accurately described (A. 53). Vice President Victory also testified as to the emotional strain that is prevalent among patients and their families and emphasized the fact that the Hospital's Employee Handbook makes numerous references to the need to avoid conduct that might tend to be disturbing to patients (A. 23). (See also discussion, *supra*, pp. 3-5). Two experienced physicians testified in this case that union solicitation in the presence of patients or visitors could very well have a harmful effect on their physical well-being. "A hospital need not wait until an untoward incident actually takes place before undertaking reasonable measures to anticipate or forestall such an occurrence." *Guyan Valley Hospital*, 198 NLRB 107, 111 (1972).

The aforementioned solicitation incidents involving Clyde Russell French, which created a "hostile" and potentially volative employee reaction in the cafeteria, could just as well have happened in one of the lobbies, an elevator, the gift shop or a hospital corridor in the presence of patients and/or members of their families. Certainly, the average person would not want to admit or keep a seriously ill loved one in a hospital that allowed such unsettling conduct to take place in those areas accessible to patients and the public. As the District of Columbia Circuit correctly noted in *Baylor University Medical Center v. NLRB*, 578 F. 2d 351 (D.C. Cir. 1978),[16] at 356:

> "Furthermore, solicitation has a disruptive force quite apart from its contribution to noise level and overcrowd-

[16] This Court in *NLRB v. Baylor University Medical Center*, — U.S. — (1978), 58 L. Ed. 2d 202, denied the Board's petition for certiorari as it sought review of the corridor issue, but remanded the case to the circuit court to reconsider the cafeteria issue in light of this Court's subsequent holding in *Beth Israel*. The Circuit Court has since remanded the case to the Board for further proceedings, — F. 2d — (D. C. Cir., January 22, 1979), 100 LRRM 2340.

ing. *There was evidence at the hearing that witnessing solicitation tends to undermine both patients' and visitors' confidence in the hospital. Having to confront the worry that employees might reduce their standards of service as part of a labor dispute seems an unnecessary and undesirable additional source of anxiety for persons already hard-taxed emotionally.* And the thought that matters affecting one's life and death are perceived in terms of wage increases and coffee breaks by those responsible for one's well-being fully justifies the very upsetting concern that patients and those close to them were shown to have about such activities. *It is not only the likelihood that congestion and commotion would result from such solicitation, but also the inherently disturbing effect of interjecting undertones of labor disputes into a situation where sick persons are totally dependent on the unflagging assistance of others that are major factors contributing to the disruptive effect of solicitation. Wherever in the hospital an emotionally vulnerable group of patients and their visitors may be present, we feel that unique considerations come into play which justify an otherwise overly broad no-solicitation rule.*" (Emphasis added)

This apprehension by patients and family members about the quality of medical care available at the hospital would, we submit, be compounded many times should such persons overhear employees discussing possible strikes, slowdowns or other work stoppages in order to obtain economic concession from the hospital. Even the most arden union supporter wants and demands the undivided attention and care of hospital personnel when he is experiencing the emotional stress that accompanies his own physical pain or discomfort, or that of an ill or injured loved one. As testified by the two medical experts in this case, any indication of indifference or lack of concern on the part of hospital personnel can deleteriously affect the psychological or physical state of both the patient and his family. Clearly,

the Board failed to consider and accord weight to all the relevant factors which are involved in the operation of Baptist Hospital in attempting to strike an acceptable balance between the right of self-organization assured to employees under the Act and the equally undisputed right of the Hospital to operate efficiently and to serve the needs of its patients.

Considering the nature and purpose of the institution, as well as the overriding necessity for protecting the physical and emotional well-being of its patients, any presumption of illegality in the Hospital's broad no-solicitation rule has been overcome by the "special circumstances" shown in the record in this case. The record evidence clearly demonstrates that a hospital environment is a unique and special situation in which a broad no-solicitation/no-distribution ban in "patient access areas" is necessary to avoid disrupting health care operations or disturbing patients. The Hospital respectfully submits that the Sixth Circuit Court gave proper consideration to the identical factors found relevant in *Beth Israel* and on the record before it properly concluded that substantial evidence failed to support the Board's conclusion that Baptist Hospital had not justified its no-solicitation rule. Quoting once more from Mr. Justice Brennan's opinion for the Court in *Beth Israel*:

"Insofar as petitioner's challenge is to the substantiality of the evidence supporting the Board's conclusions, this Court's review is of course limited.

'Whether on the record as a whole there is substantial evidence to support agency findings is a question Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance where the standard appears to have been misapprehended or grossly misapplied.' *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951)." (Emphasis added)

57 L. Ed. 2d at 390

CONCLUSION

For the reasons stated herein, the judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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No. 78-223

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

AND

LOCAL 150-T SERVICE EMPLOYEES INTERNATIONAL UNION (AFL-CIO)
Intervenor,

V.

BAPTIST HOSPITAL, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR THE UNION

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REPLY BRIEF FOR THE UNION

ARGUMENT

The Hospital's basic argument is that it did, on this record, "justif[y] the prohibition [on union solicitation and distribution] as necessary to avoid disruption of health care operations or disturbance of patients" (*Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 489). (Br. for Resp. at 15). In making this argument, however, the Hospital engages in a massive rewriting of the record, producing an interesting pastiche which bears little resemblance to the

record actually made at the administrative hearing. Further, the attempt to present this case as one involving simply the substantiality of the evidence in support of the Board's holding belies the fact that serious legal questions are buried in the evidentiary dispute—most notably, whether the Board's traditional role of balancing the interests of employees and management can be usurped by the simple expedient of producing conclusory "expert" testimony in support of the balance struck by the employer.

1. The distortion of the factual record indulged in by respondent is of particular significance for two reasons. First, the Hospital endeavors to present this case as solely a factual dispute, divorced from any significant legal questions. If this, indeed, is determined to be the case, then a precise delineation of the facts becomes all-important. Second, clear errors and unsubstantiated assumptions similar to those presented here by respondent found their way into the Court of Appeals opinion; in part for that reason, this Court cannot, as it normally does (*Labor Board* v. *Pittsburg S.S. Co.*, 340 U.S. 498, 503), rely upon the lower court's assessment of the substantiality of the evidence. Consequently, we set out below some, although by no means all, of the "facts" relied upon by respondent (and, in many cases, by the court below) which have no basis in the record.

A. *Genesis of the 1974 Rule*

Respondent insists that the 1974 no-solicitation/no-distribution rule was not a new or revised policy but simply a "clarification" of existing policy. (Br. for Resp. at 6-7). One need go no further in refuting this position than the text of the 1974 rule: "The solicitation and distribution policy of Baptist Hospital *has been revised.*" (A. 75, emphasis supplied). Further, the timing of the promulgation

of the new rule—October 4, 1974, after one month of union organizational activity—as well as the fact that Mr. French was not disciplined simply for soliciting in the cafeteria prior to October 4, 1974 although he was doing so regularly, tend to confirm one of the two *contradictory* versions of the rule's genesis presented by Mr. Victory—that there *was* a change from past practice, and that it was prompted directly by the organizational campaign (A. 5-6). At any rate, for present purposes the most important fact concerning the origin of the 1974 rule is undisputed—that, while legal counsel was consulted, *no* medical advice was sought (A. 21-22, 72-73).

B. *Character of the Cafeteria*

Respondent seeks to convey the impression that "patients and their visitors constitute about 32 percent of the cafeteria's patrons on weekdays and about 53 percent on weekends." (Br. for Resp. at 13). Actually, aside from all the other defects with the "study" relied upon (Br. for Union, at 8 n. 7), that "study" did not attempt to determine how many patrons were patients, or how many were visitors; it simply sought to establish the percentage of "non-employees." (A. 26-27). The results of the considerably more careful study in *Beth Israel* show that this is a critical oversight. In *Beth Israel*, less than 77 percent of the cafeteria patrons were employees of the hospital, yet only 1.56 percent were patients, and only 9 percent were visitors. *Beth Israel, supra*, 437 U.S. at 490,[1] the remainder were

[1] While the opinion states that 77 percent were "employees," some of those persons, although they worked regularly in the hospital, were paid by Harvard University rather than by Beth Israel. See *Beth Israel Hospital, supra*, No. 77-152 Brief for the Union at 4 n.4.

students, volunteers, attending physicians, women's auxiliary members, and private duty nurses (*Beth Israel, supra,* Brief for the Union at 4), all categories of persons likely to be present at any hospital. Further, while the precise percentage of patients using the cafeteria at Baptist is not known, there is undisputed testimony, from Hospital witnesses that such use is only on "rare occasions." (A. 50).

The Hospital also maintains that its cafeteria is not a "natural gathering place" for the Hospital's employees (Br. for Resp. at 21) and that "there is no evidence that the majority of the Hospital's employees go to the main cafeteria during their relief periods" (*id.*, n. 13). Mr. Victory, however, testified that the cafeteria is an area where the employees relax (A. 12), and that employees who are in the cafeteria are normally on break or lunch period (*id.*). There was, in addition, explicit testimony that employees "normally" take their breaks "[i]n the cafeteria or the snack bar" (A. 49), see also A. 51, A. 71 ("most people took their breaks" in the cafeteria).

Further, respondent heavily relies upon the Sixth Circuit's statement that there are, at Baptist, a "large number of areas which are closed to patients and the public where the no-solicitation rule does not apply." (Pet. App. 10a.) The Court of Appeals, however, was under the plainly erroneous impression that there were "several" employee lounges, rather than two (Pet. App. 3a) and seemed unaware of the fact that those two lounges catered to specialized groups of employees. (A. 17-18.) The court below also considered the parking lot as an area open to solicitation (Pet. App. 11a; see Br. for Resp. at 12), despite testimony by Mr. Victory that, as the rule on its face would suggest,

no organizational activity is permitted there. (A. 15-16.)[2]

Moreover, the uncontradicted testimony is that nurse's stations and utility rooms are *not* available for "distribution," as the Court of Appeals believed; that, while certain individuals present in nurse's stations may be on break (A. 26), there are likely to be present, at any given time, persons working (A. 18); that employees have never been *told* that nurses' stations are not considered areas open to the public for solicitation purposes, even through there is limited public access. (A. 19); and that, while utility rooms are "sometimes" used as break areas (A. 18), such usage is not prevalent (A. 49, 71). Thus, the "large *number*" of areas the lower court supposed available plainly do not, as respondent suggests and the court below seemed to believe, provide a substantial opportunity to reach most employees.

The Hospital also manufactures a distinction between its hortatory rule regarding conversations with other employees on particular patients—"be particularly careful * * * in places of public assembly" (A. 98-99)—and that in *Beth Israel*—"restrict the voicing of your clinical discussion." (437 U.S. at 503 n.20.) (See Br. for Resp. at 23.) A difference beyond the particular words used to express

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[2] Mr. Victory later seemingly contradicted himself once again, stating that an employee "would be permitted to distribute or solicit in the parking lot as long as it didn't became a nuisance with litter," (A. 34). At the same time, he acknowledged that the rule states otherwise and that the Hospital enforced its rules as written (*id.*). Obviously, employees cannot be expected to read Mr. Victory's variable mind when deciding what activity to undertake. Therefore, unless there were evidence—which there is not—that an exception to the written rule was publicly announced, the rule must be taken to apply as promulgated.

the same thought cannot be discerned. Thus the statement that "there is no evidence * * * that the Hospital has adopted a less restrictive approach to behavior in the cafeteria * * * as disquieting * * * as union solicitation" (Br. for Resp. at 14) is false.

Similarly, while the Hospital stresses "uncontradicted testimony by * * * French acknowledging that his union solicitation had already resulted in untoward incidents involving open expressions of hostility *between employees*" (Br. for Resp. at 23 emphasis supplied), the "uncontradicted testimony" is the opposite. French simply testified that certain people he solicited in the cafeteria "expressed open hostility *toward the union*"; none "expressed open hostility toward [French]" (A. 68, emphasis supplied.) The Hospital fails to explain what is "untoward" about an employee expressing his adverse views about unions to another employee, as long as no disruption occurs. (See Br. for Union at 27, n.23.) Indeed, while a union organization campaign is going on in a hospital one would expect simply conversations among employees concerning the union in the cafeteria even if no solicitation were permitted there; and, such discussion could well include expression of "likes and dislikes" with respect to the union" (A. 68) which is all that the "untoward" incident of "hostility" actually amounted to. Further, while the Hospital refers to "the *overheard* conversations" (Br. for Resp. at 23, n.19, emphasis supplied) there is *no* evidence that conversations were overheard. In fact, as in *Beth Israel*, there is no evidence that any patient or visitor was ever even aware of, much less disturbed by, union activity in the Baptist cafeteria while it was permitted to continue.

C. *The Medical Testimony*

Respondent, and the Court of Appeals, rely most heavily upon the supposed "highly pertinent and wholly uncontradicted expert testimony supporting the medical necessity for the no-solicitation rule." (Br. for Resp. at 23-24; see also Pet. App. 7a-8a). But that testimony, when reviewed in detail (see Br. for Union at 10-11; 24-28) does not at all show "medical necessity for the no-solicitation rule." Rather, the doctors, with no first-hand experience of union activity were competent only to testify in response to *hypothetical* situations; the situations presented to them were those in which union activity had become "volatile, hostile or heated" (A. 40, 42) or took the form of "turmoil, confusion, loud noises * * * a general meeting [or] a speech." (A. 53, 62, 63-64.) Thus, the Administrative Law Judge's refusal to find in this hypothetical testimony significant evidence of real-world "medical necessity" for the solicitation rule (Pet. App. 75a) was entirely justified by the character of the testimony given, and by a common-sense evaluation of that testimony requiring no medical expertise.[3]

Furthermore, despite suggestions to the contrary, (Br. for Resp. at 20) there is no expert testimony in this case regarding a special *medical* emphasis upon controlled mobility or "relat[ing] such [medical] practices * * * to its cafeteria." (*Beth Israel, supra*, 437 U.S. at 517 (Powell, J., concurring).) The doctors did testify that at various points in their hospital stay many patients *are* mobile (A.

[3] For example, as the ALJ noted, the great stress placed by the doctors upon the need to shield patients from all *conceivable* sources of upset is belied by the presence of newspapers, televisions, and radios in hospitals. (Pet. App. 75a.)

40-41, 54-55). But, while patients may be permitted to go down to the lobby, or to the cafeteria (*id.*) there is no indication whatever that the hospital's medical care program ever required or encouraged any patient to use the cafeteria, the lobby, or any other non-patient care area.

The factual errors reviewed above do not appear to us to be instances in which a rational program could view the evidence as "tilting" one way or the other (see *NLRB* v. *Pittsburg S.S. Co., supra,* 340 U.S. at 503). Rather, the statements of "fact" made by respondent and, in some cases, echoed by the Court of Appeals, are either made of whole cloth or are general emotion-charged characterizations of evidence which, upon detailed examination, cannot possibly carry the weight placed upon it.[4]

2. The heavy emphasis upon the "medical" testimony is important for another reason. It illustrates that this is *not* a case involving simply the substantiality of the evidence. As we discussed at length in our opening brief (at pp. 24-29) the Court of Appeals' reliance upon the doctors' testimony as the basis for overturning the Board's determination of the appropriate balance between the Hospital's patient care interest and the employees' self-organization interest, evinces a misapprehension of the deference appropriately due the NLRB in administering the Act. Insofar as

[4] Further, the internally inconsistent nature of much of the evidence produced by the Hospital—particularly, the self-contradiction in the testimony of the Hospital's primary witness, Mr. Victory,—certainly do not entitle the respondent, and the court below, to seize upon that part of the evidence they would have preferred to credit, and to contend that the Board's determination was not based on substantial evidence on the record as a whole. The Board was, in this circumstance, entitled to make credibility determinations and to establish which portion of the evidence was believable.

the doctors testified that loud noises, violence and disturbance could be harmful to patients, their testimony was perhaps entitled to some consideration. But the doctors were not, as they conceded, experts upon or, even, knowledgeable about the real likelihood of such disturbances occurring due to union activity. Their testimony that it is necessary to the Hospital's mission to ban union solicitation is therefore simply an opinion upon whether or not the unknown risk of such disturbance is worth taking. And precisely because it is formed against a lack of knowledge of labor relations facts and law such an opinion is unlikely to represent a balancing of risks consistent with that required by the national labor policy. Thus, even when there is no contrary testimony by other medical experts, the Board is surely not required to accept as conclusive statements that run counter to common experience about hospital standards of care—for example, statements suggesting that patients in a busy cafeteria will be harmed if off-duty staff persons are not "concerned exclusively with patient care" (Pet. App. 8a).

The court below in taking its quite different view of the deference to be accorded the doctors' testimony relied in part upon "Congressional concern for the special circumstances of hospitals as shown by the legislative history of the 1974 Amendment," (Pet. App. 9a). This Court's *Beth Israel* opinion, however, squarely rejected the notion that the 1974 Congress intended the Board's function in hospital cases to differ from that exercised in cases arising in other industries. (437 U.S. at 496-501.) Thus, the Court of Appeals, in requiring the Board to accept the risk-balancing preferences of medical experts testifying for the Hospital, was applying an erroneous standard of review, based upon

a mistaken understanding of the 1974 Amendment. In such a circumstance this Court does have a duty to intervene to assure that the proper balance between the role of the NLRB and that of the Courts of Appeals is restored. (*Universal Camera Corp.* v. *Labor Bd.*, 340 U.S. 474, 491.)

CONCLUSION

For the reasons stated in the Union's opening and reply briefs, the judgment of the Court of Appeals for the Sixth Circuit should be reversed. Failing that, the judgment below should be vacated and the cause remanded with instructions to remand to the NLRB for further factual development.

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October Term, 1978

No. 78-223

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Respondent.

MOTION FOR LEAVE TO SUBMIT BRIEF AND AMICUS CURIAE BRIEF ON BEHALF OF THE NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO SUBMIT BRIEF
AS AMICUS CURIAE

To the Honorable, the Chief Justice and
The Associate Justices of the
United States Supreme Court

Pursuant to Rule 42(3) of the Rules of this Court, the National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO (hereinafter the "National Union") moves this Court for leave to file the accompanying brief as Amicus Curiae in support of the Petitioner. In support of the motion, the National Union shows as follows:

1. Nature of the Applicant's Interest

The National Union represents approximately 100,000 health care employees in over 350 health care institutions. This case is of vital concern to the Union and the members it represents as the right of employees in this industry to organize and to join and assist labor organizations will be directly affected by the outcome of this case.

The decision of this Court in this matter will, of course, have a profound impact on the rights of health care employees to solicit their fellow employees to join them in becoming members of Unions. If the decision of the Court below is upheld, Unions and employees in the health care industry will be deprived of rights that, for many, were only recently secured from Congress when the latter passed the 1974 Amendments to the Labor-Management Relations Act (hereinafter the "Act") which provided for the first time, coverage under the Act for employees employed by non-profit hospitals.

2. Amicus' Qualification

The National Union filed an amicus brief with the National Labor Relations Board (hereinafter the "Board") in St. John's Hospital and School of Nursing, Inc., 222 NLRB 1150 (1976), the case in which the Board established its current policy concerning solicitation and distribution rules in the health care industry. In addition, one of the Locals of the National

Union was the charging party before the Board in another case involving the right of health care employees to solicit and distribute Union literature. The Board's order in the latter case was enforced in pertinent part in Lutheran Hospital of Milwaukee, Inc. v. N.L.R.B., 564 F.2d 208 (CA 7 1977), cert. granted and case remanded, 98 S.Ct. 3118 (1978).

The National Union also submitted an amicus brief to this Court in Beth Israel Hospital v. N.L.R.B., 98 S.Ct. 2463 (1978), a case dealing with the same issue before the Court in this case.

3. The Need For The National Union As Amicus

The National Union has been in the forefront in attempting to organize employees in the health care field. It has been engaged in this task for over twenty years. It therefore possesses a unique background and experience which will be of unquestionable assistance to the Court in deciding the issues raised in this case.

4. Request For Consent To Submit

On February 1, 1979, the National Union requested the consent of the Petitioner and Respondent to submit a brief Amicus Curiae. The Solicitor General, on behalf of Petitioner National Labor Relations Board consented in a letter dated February 5, 1979 attached hereto. The attorneys for

the Respondent informed my office by telephone that they could not give such consent.

WHEREFORE, it is respectfully requested that the National Union be granted leave to file the accompanying brief Amicus Curiae in this case.

Dated:

New York, N.Y.
February 13, 1979

Respectfully submitted,

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-223

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BAPTIST HOSPITAL, INC.,

Respondent.

AMICUS CURIAE BRIEF SUBMITTED ON BEHALF OF THE NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO

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STATEMENT OF THE CASE

Amicus will not burden the Court with a restatement of the facts but rather, endorses the statement contained in petitioner's brief.

ARGUMENT

THE COURT BELOW ERRED IN REFUSING TO ENFORCE THE ORDER OF THE BOARD WHICH FOUND THAT THE HOSPITAL VIOLATED SECTION 8(a)(1) OF THE ACT BY PROMULGATING A RULE WHICH PROHIBITED EMPLOYEES, DURING NON-WORKING TIME, FROM SOLICITING UNION SUPPORT IN ALL AREAS OF THE HOSPITAL TO WHICH PATIENTS AND VISITORS HAVE ACCESS

The Board, with court approval, has long held that an Employer may not lawfully adopt a rule prohibiting employee solicitation of Union membership during non-working time or prevent distribution of Union literature during non-working time in non-working areas, absent special circumstances. Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793 (1945); N.L.R.B. v. Magnavox Company, 415 U.S. 322 (1974); Stoddard-Quirk Mfg. Co., 138 NLRB 615 (1962).

Hospitals contended however that because of their unique status in providing services to the ill and infirm, the Board should adopt a special rule applicable to such institutions which would permit them to prohibit solicitation and distribution by employees on their non-work time in all areas to which the public and patients have access. The Board, in St. John's Hospital and School of Nursing, Inc., 222 NLRB 1150 (1976) held that since "the primary function of a hospital is patient care," a "tranquil atmosphere is essential

to the carrying out of that function." The Board concluded that a hospital may lawfully ban all employee solicitation, even during non-working time, in "strictly patient care areas" such as patient rooms, operating rooms and X-ray and therapy facilities.

However the Board rejected as too broad the position of the hospitals that all solicitation and distribution of Union literature should be banned in all areas to which patients and visitors have access including cafeterias, lounges, and the like. The Board held, on balance, that "the interests of patients well enough to frequent such areas do not outweigh those of the employees to discuss or solicit Union representation." 222 NLRB at 1151.

In the instant case, the Employer's no-solicitation/no-distribution rule prohibited employees from soliciting Union support or distributing Union literature in any area open to the public or in any area where work is performed. Pursuant to this rule neither solicitation nor distribution was permitted in the Employer's gift shop, the main cafeteria, lobbies, public rest rooms, entrances and sidewalks leading to the entrances, and a parking lot located across the street from the hospital. The only areas where employees could engage in solicitation under this rule were two employee lounges, the utility rooms and perhaps the nurses' stations. One of the lounges is located at some distance from the main patient care area where most of the employees work and is thus not readily accessible

to most employees on short breaks. The other lounge can only accommodate 25 to 30 employees and is utilized primarily by employees who work on the floor where it is located. Baptist Hospital, Inc., 223 NLRB 344, 348, 349 (1976).

Following its decision in the St. John's case, supra, the Board concluded that the rule violated Section 8(a)(1) as it prohibited solicitation during non-work time in areas of the hospital other than immediate patient care areas.

The United States Court of Appeals for the Sixth Circuit denied enforcement of the Board's order. 576 F.2d 107 (CA 6 1978). The Court concluded that the hospital had shown that special circumstances existed which justified its rule. These circumstances were that patients had access to the areas in which solicitation was prohibited and that the rule was necessary to prevent disruption of patient care. The decision of the Sixth Circuit predated the decision of this Court in Beth Israel Hospital v. N.L.R.B., 98 S.Ct. 2463 (1978).

In the Beth Israel case the Court decided that nothing in the legislative history of the 1974 Amendments to the Act indicated that Congress was not satisfied "to rely on the Board to continue to exercise the responsibility to strike the appropriate balance between the interests of hospital employees, patients and employers." 98 S.Ct. at 2471. The Court therefore upheld as proper:

> "The Board's general approach of requiring health care facilities to permit employees' solicitation and distribution during non-working time in non-working areas, where the facility has not justified the prohibitions as necessary to avoid disruption of health care operations or disturbance of patients. . . ." Id. at 2477.

The Board in the St. John's case, supra, reached an accommodation between the competing rights and interests of the hospital employees and their employers. While the National Union would have preferred that the traditional rules of the Board with respect to solicitation and distribution of literature be applied equally to health care employees, the Board's decision reaching the accommodation was well within its discretion as:

> "[T]he Board has the 'special function of applying the general provisions of the Act to the complexities of industrial life.' NLRB v. Erie Resistor Corp., 373 U.S. 221, 236, 83 S.Ct. 1139, 1150, 10 L.Ed.2d 308 (1963); see Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798, 65 S.Ct. 982, 985, 89 L.Ed. 1372 (1945); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 196-197, 61 S.Ct. 845, 853-854, 85 L.Ed. 1271 (1941), and its special competence in this field is the justification for the deference accorded its determination.

> American Ship Building Co. v. NLRB, 380 U.S. at 316, 85 S.Ct., at 966. Reviewing courts are of course not 'to stand aside and rubber stamp' Board determinations that run contrary to the language or tenor of the Act, NLRB v. Brown, 380 U.S. 278, 291, 85 S.Ct. 980, 988, 13 L.Ed.2d 839 (1965). But the Board's construction here, while it may not be required by the Act, is at least permissible under it, and insofar as the Board's application of that meaning engages in the 'difficult and delicate responsibility' of reconciling conflicting interests of labor and management, the balance struck by the Board is 'subject to limited judicial review.'" N.L.R.B. v. J. Weingarten, Inc., 420 U.S. 251, 266, 267 (1975).

The Hospital still insists, however, that the very fact that a health care facility is involved justifies its restrictive no-solicitation rule. It would place the burden upon the Board to prove that patient care will not be disrupted; failing that the validity of its rule would be sustained.

It is true of course that Congress recognized the special needs of health care institutions. Notice provisions dealing exclusively with such institutions were included in the Act to allow these institutions to prepare for labor disruptions. However the provisions added to

the Act which deal exclusively with health care institutions do not relate to rules pertaining to solicitation or distribution. To the contrary, they pertain solely to the need of such institutions to maintain continuous service to patients.

None of the unique provisions included in the 1974 Amendments by Congress even remotely deals with solicitation and distribution rules. Since Congress did not enact any limitations on employee solicitation rights in the health care industry, the Board was free to make the accommodation it reached in this case.

Moreover the Hospital completely ignores the fact that the major purpose of the amendments was to confer upon employees of non-profit health care institutions all of the rights guaranteed to other employees already covered by the Act. The House Report, No. 93-1051 stated with reference to the health care amendments:

> "The bill removes the existing Taft-Hartley exemption in section 2(2) of the Act. It restores to the employees of nonprofit hospitals the same rights and protections enjoyed by the employees of proprietary hospitals and most all other employees. Indeed, the Committee could find no reason why 1,427,012 employees of these nonprofit hospitals - representing 56% of all hospital employees - should continue to

be excluded." H. Rept., No. 93-1051, 93rd Cong. 2d Sess., p. 4.

See also, S. Rept., No. 93-766, 93rd Cong. 2d Sess., p. 3.

When the Senate was considering the conference report, Senator Williams discussed the principal purpose of the amendments in the following language:

> "During the course of the recent debates the principal purpose of the bill - the extension of collective bargaining rights, was never the subject of serious challenge or controversy. Hopefully this unanimity will be interpreted to to mean that employees of nonprofit hospitals will no longer have to maintain their status as second-class citizens in this area of labor relations." 120 Cong. Rec. 22574 (July 10, 1974, Remarks of Senator Williams).

See also, 120 Cong. Rec. 16900 (May 30, 1974, Remarks of Representative Ashbrook); 120 Cong. Rec. 22578 (July 10, 1974, Remarks of Senator Javits); 120 Cong. Rec. 22579 (July 10, 1974, Remarks of Senator Taft).

Clearly then, Congress' intention was to treat health care employees in the same manner as all other employees except where special provisions were enacted to ensure against interruptions of patient

care because of strikes or picketing. Congressional concern did not extend to solicitation and distribution rules. Indeed as noted by the Court in Beth Israel Hospital v. N.L.R.B., supra, Congress did not even prohibit strikes in this industry:

> ". . . Indeed, although Congress recognized that strikes could cause complete disruption of patient care and enacted provisions designed to forestall them, it apparently felt that extension of the right to strike was sufficiently important to fulfillment of its goals to permit strikes despite that result. If Congress was willing to countenance the total, albeit temporary, disruption of patient care caused by strikes in order to achieve harmonious employer-employee relations and long-term improved health care, we cannot say it necessarily regarded appropriately regulated solicitation and distribution in areas such as the cafeteria as undesirable without evidence of a substantial threat of harm to patients." 98 S.Ct. at 2473.

To sustain the Hospital's position would mean, in many cases, that all areas of a health care facility would be excluded from solicitation as patients could have access to all areas of the institution. Indeed this was the situation in Baylor University Medical Center v. N.L.R.B.,

578 F.2d 351 (CA D.C. 1978).*

The burden must remain on the employer "to bring forward positive evidence showing that solicitation activities had a disrupting effect upon patients' health." N.L.R.B. v. National Jewish Hospital, ___F.2d___, 99 LRRM 3141, 3144 (CA 10 1978). No such evidence was introduced in this case. The Hospital merely indicated that patients have access to most of the areas of the hospital. As stated above, if the mere presence of patients can prevent Union solicitation, the entire hospital would be rendered off limits to solicitation.

The argument that discussion of Union affairs will have a disrupting effect on patient care is belied by the experience of the National Union. Almost all of the collective bargaining agreements negotiated by the National Union or its affiliated districts contain a Union visitation clause which permits organizers and delegates reasonable access to the various departments of the hospital which employ members of the bargaining unit for the purpose of conferring on problems and grievances and to be of assistance in administering the contract. Despite the fact that access under these

---

*Baylor employed over 3,700 individuals and has a bed capacity of 1,125. 578 F.2d at 355.

agreements is broader than the rule enunciated by the Board, no problems involving disruption of patient care have developed.

Another variant of the position espoused by employers in the health care industry is that a broad no-solicitation/no-distribution rule prohibiting such activity in all areas to which patients and visitors have access should be deemed presumptively valid. Only if an institution does not maintain employee only areas or if such areas are inadequate would employees be allowed to solicit and distribute in locations such as cafeterias, lounges, and gift shops where patients and visitors may be present.

This proposal, if adopted, would result in endless litigation to determine the adequacy of employee only areas. Moreover it distorts the purpose of the Act which is to protect employees in the exercise of their Section 7 rights. Activities such as solicitation for Union purposes must be deemed presumptively valid under Section 7 as this Court only recently reaffirmed in Beth Israel Hospital v. N.L.R.B., supra. The burden there was correctly placed upon the employer to establish that a more extensive ban is necessary to prevent disruption of patient care. The Hospital here has not met that burden.

It has not shown, for example, any irresponsible employee behavior or other conditions relating to employee solicitation

or distribution which establish that patient care would be disrupted. An employer is free to discipline employees who act in a disorderly or disruptive manner. It is thus not necessary to limit employee rights under Section 7 of the Act to prohibit such behavior.

CONCLUSION

For the above stated reasons, the order of the Court below denying enforcement of the order of the Board should be reversed.

Respectfully submitted,

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Re: NLRB v. Baptist Hospital,
Inc. - No. 78-223

Dear Mr. Dorn:

As requested in your letter of February 1, 1979, I consent to the filing of an amicus curiae brief on behalf of the National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO.

Sincerely,

Wade H. McCree, Jr.
Solicitor General

FOR ARGUMENT

Supreme Court, U. S.
FILED
MAR 28 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-223

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

BAPTIST HOSPITAL, INC.,
Respondent.

BRIEF OF HOSPITAL CORPORATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT, BAPTIST HOSPITAL, INC.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-223

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
BAPTIST HOSPITAL, INC.,
Respondent.

BRIEF OF HOSPITAL CORPORATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT, BAPTIST HOSPITAL, INC.

INTEREST OF AMICUS CURIAE

HOSPITAL CORPORATION OF AMERICA (hereinafter HCA) is the parent corporation or manager of approximately one hundred twenty-three hospitals which operate across the United States. HCA hospitals have a capacity of over 18,000 beds and employ approximately 37,000 employees. The Court's decision in the above case is of major concern to HCA because of the impact the decision

could have on tailoring no-solicitation/distribution rules to the special circumstances presented by a hospital setting.

HCA participated as *amicus* in *St. John's Hospital and School of Nursing, Inc.*, 557 F.2d 1368 (10th Cir. 1977), in the Petition for Writ of Certiorari in *Lutheran Hospital of Milwaukee, Inc.* v. *NLRB*, 435 U.S. 941 (1978), and in the case *sub judice* in the Sixth Circuit Court of Appeals. *NLRB* v. *Baptist Hospital, Inc.*, 576 F.2d 107 (6th Cir. 1978). HCA is presently participating as *amicus curiae* before the National Labor Relations Board in three cases which share the common issue of the validity of no-solicitation/distribution rules in hospitals.[1]

HCA has received permission from both the Respondent and Petitioner to participate in this case.

INTRODUCTION

Decisions subsequent to this Court's decision in *Beth Israel Hospital* v. *NLRB*[2] have been confused and conflicting in their application of *Beth Israel's* holding. This confusion necessitates a reexamination of the underlying principles in that case.

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1. The three cases are *Lutheran Hospital of Milwaukee, Inc.*, Case No. 30-CA-3082, *Baptist Memorial Hospital*, Case No. 26-CA-5921 and *Beth Israel Hospital*, Case No. 1-CA-11469. *Lutheran Hospital* is the same case remanded by this Court on June 26, 1978 in *Lutheran Hospital of Milwaukee, Inc.* v. *NLRB*, 435 U.S. 941 (1978). *Beth Israel* is a separate case from the one decided by this Court in *Beth Israel Hospital* v. *NLRB*, ... U.S. ....., 57 L.Ed.2d 370 (1978), but it involves the same hospital. The issue in this second case involves the validity of the hospital's no-solicitation rule as it applies to areas of the hospital other than the cafeteria.

2. ..... U.S. ....., 57 L.Ed.2d 370 (1978).

Background

On March 4, 1976, the Board issued its *St. John's*[3] decision. The decision was a reversal of the Board's prior position as to the validity of hospital no-solicitation/distribution rules.[4] It held that no-solicitation/distribution rules in areas to which patients and visitors have access, other than immediate patient care areas, are presumptively unlawful.

The application of this presumption resulted in a multitude of contested Board decisions and conflicting circuit court holdings. [*See, Baylor University Medical Center, Inc.* v. *NLRB*, 578 F.2d 351 (D.C. Cir. 1978) (*enf. denied* in part); *NLRB* v. *Baptist Hospital*, 576 F.2d 107 (6th Cir. 1978) (*enf. denied*); *St. John's Hospital and School of Nursing, Inc.* v. *NLRB*, 557 F.2d 1368 (10th Cir. 1977) (*enf. denied*).] Each circuit court seemed to apply the general rule in a new way. Several courts refused enforcement altogether.

On June 22, 1978, this Court's *Beth Israel*[5] decision was handed down. In a bare five man majority, this Court held "that the Board's general approach of requiring health-care facilities to permit employee solicitation and distribution during nonworking time in nonworking areas, where the facility has not justified the prohibitions as necessary to avoid disruption of health care operations or disturbance of patients, is consistent with the [National Labor Relations Act]."[6]

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3. *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150 (1976).

4. *See, Guyan-Valley Hospital, Inc.*, 198 NLRB 107 (1972).

5. *Beth Israel Hospital, supra* n. 2.

6. *Id.* at 389.

The balance of this Court's *Beth Israel* decision was limited to the facts of the case.[7] It did not approve application of the Board's general rule as it may relate to employer rules banning solicitation or distribution in other "nonwork areas" (besides employee dominated cafeterias) of the hospital.[8] Further, it did not adopt the Board's "immediate patient care area" terminology for defining what constitutes "working areas,"[9] undoubtedly due to the inherently undefinable nature of that term.

---

7. The facts of *Beth Israel* were horribly one-sided. The area of the hospital in which the no-solicitation/distribution rule was applied was a *de facto* employee-only cafeteria. This is not the typical patron composition of most hospital cafeterias.

8. The limited application of the majority's opinion was noted by Justice Powell in footnote nine to his concurring opinion. "[T]he Court's opinion expresses no view as to the validity of prohibiting employee solicitation or distribution in other areas of a hospital which may not be devoted 'strictly' or 'immediately' to patient care but to which patients and visitors have access. The question was not presented in this case." *Beth Israel Hospital* v. *NLRB*, *supra* n. 1, 57 L.Ed.2d at 396 n. 9.

9. "Work area", or similar terms, as used here and elsewhere in this brief and as used by this Court in its *Beth Israel* decision, refers to the areas of a hospital which are used to administer patient care and therapy. Obviously, work is performed in other areas of the hospital which are not utilized in the delivery of medical care, e.g., laundry rooms.

The traditional *Republic Aviation* analysis applies to work areas of a hospital which are not involved in the delivery of patient care, e.g. employees may lawfully be prevented from engaging in solicitation or distribution in work areas on working time.

This consideration was overlooked by the Tenth Circuit in *St. John's Hospital and School of Nursing, Inc.* v. *NLRB*, 557 F.2d 1368 (1977). In *St. John's*, part of the Tenth Circuit's decision found "substantial evidence" in the record as a whole to support the Board's finding that the hospital had committed an unfair labor practice by reprimanding employees for engaging in prounion discussion in a supply room while on working time. The Tenth Circuit's holding was undoubtedly a product of its preoccupation with defining the scope of legal no-solicitation/distribution rules as applied to patient-care areas of the hospital.

Regardless of the Tenth Circuit's *St. John's* decision, it cannot be candidly argued that an employer may not restrict its employees from engaging in solicitation or distribution while on working time.

On October 30, 1978, this Court affirmed that portion of *NLRB* v. *Baylor University Medical Center*[10] dealing with the validity of a no-solicitation/distribution rule in the hospital's corridors. The 6-3 decision specifically noted that the corridor issue was "neither involved nor considered by the Court in *Beth Israel*."[11]

On January 8, 1979, this Court granted the National Labor Relations Board's Petition for Writ of Certiorari in the case *sub judice*. Unlike *Beth Israel*, this case involves the hospital-wide application of a contested no-solicitation/distribution rule. Unlike *Beth Israel*, this case contains record evidence of other areas in and around the hospital in which organizational rights can be effectively exercised. Most importantly, unlike *Beth Israel*, this case contains record evidence of uncontradicted testimony from the hospital's medical staff that maintenance of the hospital's no-solicitation/distribution rule is necessary to insure the proper delivery of patient care.

HCA anticipates that this Court is preparing to issue a definitive decision regarding the validity of no-solicitation/distribution rules in all areas of the hospital. HCA urges this Court to remedy the narrow and illogical application that the Board has given its general approach to defining "work areas" of a hospital. Alternatively, HCA urges this Court to reconsider its *Beth Israel* decision and reject the Board's general approach altogether.

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10. ..... U.S. ....., 58 L.Ed.2d 202 (1978).

11. *Id.* at 204. Justice Brennan's dissenting opinion took the view that the circuit court's opinion in *Baylor* was in direct conflict with this Court's *Beth Israel* decision. *Id.* at 205.

ARGUMENT

I. The Board's Lay Conception of "Work Area" Is Unworkably Narrow

In *St. John's Hospital and School of Nursing, Inc.*[12] the National Labor Relations Board ostensibly recognized that the special needs of a hospital justify no-solicitation/distribution rules in areas of the hospital in which patients receive medical care. The Board then proceeded to contradict itself by noting only the narrowest and most obvious areas of a hospital as those in which no-solicitation/distribution rules would be appropriate. "[A] hospital may be warranted in prohibiting solicitation even on nonworking time in strictly patient care areas, such as patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas."[13] This lay approach to defining "work area" has resulted in conflicting Board and court decisions illustrating the unworkability of the narrow definition.

The Board's *St. John's* decision proceeded no further than the initial appeal to the Tenth Circuit before the unworkability of the new[14] general approach became evident.[15] Chief Judge Lewis specifically noted in his opinion the inconsistent results which would obtain from application of the Board's confused approach.

12. 222 NLRB 1150 (1976).

13. *Id.*

14. This new general approach resulted from the Board's reversal of its prior position which was adopted in *Guyan-Valley Hospital, Inc.*, 198 NLRB 107 (1972).

15. *St. John's Hospital and School of Nursing, Inc.* v. *NLRB*, 557 F.2d 1368 (10th Cir. 1977).

> It is unclear from the Board's decision what restrictions would be allowed in other areas accessible to patients but not specifically classified by example such as hallways, elevators, stairs, or waiting rooms. The only guideline for classifying these areas supplied by the Board's decision is the blanket assertion that [o]n balance, the interests of patients well enough to frequent such areas [as cafeterias, lounges, and the like] do not outweigh those of the employees to discuss or solicit union representation. A.R. at 35. Under this rationale the distinction between various patient access areas is made to turn on the condition of the patients 'frequenting' these areas and whether such areas are 'strictly' devoted to patient care.
>
> • • •
>
> We are therefore compelled to conclude that the ultimate factual inferences on which the Board's distinction was based were drawn not from the record evidence but rather from the Board's own perceptions of modern hospital care and the physical, mental, and emotional conditions of hospital patients—areas outside the Board's acknowledged field of expertise in labor/management relations. Moreover, this distinction is difficult of application at best and indeed has been rejected by the Board in a similar context as 'specious'.[16]

The United States Circuit Court for the District of Columbia also concluded that the Board's general approach was impossible to apply.[17] In *Baylor University Medical Center* v. *NLRB*,[18] the court refused enforcement of that

16. *Id.* at 1372-73.

17. *Baylor University Medical Center* v. *NLRB*, 578 F.2d 351 (D.C. Cir. 1978).

18. *Id.*

part of the Board's order which prohibited the hospital from enforcing a no-solicitation/distribution rule in the hospital's corridors. The Board had reached the untenable conclusion that Baylor University Medical Center's corridors, which serve as passageways through which thousands of ambulatory patients pass each day, which serve as the only avenue for delivering life-sustaining medical aid which must be ready at a moment's notice and which occasionally serve as an area in which emergency aid is administered, are not involved in the delivery of immediate patient care.

> We agree with the Tenth Circuit that even were it possible—which it manifestly is not—to determine with any confidence and rationality which areas in a hospital are and which areas are not 'immediately' involved in patient care, the Board's overly restrictive position on the valid extent of no-solicitation rules in medical facilities must nevertheless be overturned as insensitive both to the unique conditions found in an acute general hospital and to the declared intent of Congress.[19]

And even though the Seventh Circuit in *Lutheran Hospital of Milwaukee, Inc.* v. *NLRB*[20] purported to have no problem in applying the Board's new rule, that same case has subsequently found itself before this Court,[21] before the Seventh Circuit[22] for a second time and, finally, before the Board[23] for reevaluation.

This muddled situation mandates a more realistic application by the Board of its general approach.

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19. *Id.* at 353.
20. 564 F.2d 208 (7th Cir. 1977).
21. 435 U.S. 941 (1978).
22. No. 78-1668, Sept. 28, 1978.
23. *Supra* n. 1.

II. "Work Area" Must Be Broadly Defined to Include (1) the Areas of a Hospital in Which Patients Receive Their Therapy and Care, (2) the Areas Which Are Vital to Servicing of Areas in Which Patients Receive Therapy and Care, and (3) the Areas Which Are in Close Proximity to Areas in Which Patients Receive Therapy and Care.

In determining what areas of the hospital are "work areas" for the purpose of applying its presumption to rules on solicitation, the Board should include not only areas of a hospital which are vital to the servicing of the patient care areas, but also areas of a hospital which are in such close proximity to patient care areas that solicitation or distribution in those areas would invoke the same concerns as would solicitation or distribution in the actual areas of the hospital reserved for patient care and therapy.

A prime example of areas of the hospital which are vital in servicing those areas of the hospital reserved for patient care and therapy are hospital corridors.[24] Corridors are critical to a hospital. Depending on the treatment and the particular hospital, corridors may also be used as an area for patient care and therapy, particularly for ambulatory patients.

> "The importance of preventing crowding and disruption in the hospital corridors cannot be seriously debated. Quick and unimpeded passage through the hallways was shown to be imperative to the efficient operation of the hospital and to the success of certain of its emergency services, such as the cardiac arrest unit. The hallways serve not only as passageways for pa-

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24. The term "corridors" should be broadly defined to include any areas of the hospital through which medical personnel and equipment traverse. For example, hospital stairwells are continually used by medical personnel to go floor-to-floor for each succeeding medical emergency.

tients, visitors, doctors and medicine, but also as viewing rooms for the nursery and storerooms for a variety of hospital equipment which must be available at a moment's notice."[25]

In addition, in many hospitals, especially general city or county facilities, therapeutic aid and other patient care is necessarily administered on a regular basis in the hospital corridors due to constant overcrowded emergency and admitting room areas. This is especially so in large urban areas.

An example of an area of a hospital which is in close proximity to patient care areas might be a kitchen in which only hospital employees are allowed, but which is in such close proximity to the patient-only dining area for patients with emotional or nervous disorders that the patients could overhear or observe solicitation and distribution efforts. Another example might be a nurses station which is located so close to patients' rooms that patients could see or hear pro or anti-union solicitation.

Therefore, before applying the general approach approved in *Beth Israel* on an industry-wide basis, the Board should broadly define "work area" as including (1) the areas of a hospital in which patients receive their therapy and care, (2) the areas of a hospital which are vital to the servicing of areas in which patients receive their therapy and care, and (3) the areas of a hospital which are in such close proximity to the areas in which patients receive therapy and care that patients in those latter areas can see or overhear the solicitation activity.

Even though broadly construed, a different definition of "work area" will necessarily result for each case due to

25. *Baylor University Medical Center, Inc.* v. *NLRB, supra* n. 16, 578 F.2d at 355.

varying situations. As argued immediately *infra*, accurate definitions of "work area" in each case can only be obtained pursuant to individual, case-by-case evaluation.

III. The Board's General Approach Is Workable Only If Applied on a Case-by-Case Basis After Considering Testimony From the Hospital's Medical Staff.

In *Beth Israel* this court did not adopt the Board's "strictly patient care area" definition of "work area," as that term was defined by the Board in *St. John's*.[26] As cases subsequent to *St. John's* have clearly demonstrated, the term "strictly patient care area" is a nebulous and amorphous term which has different meanings in different situations. It cannot be applied to all hospitals in general because of the tremendous variation in types of hospitals, species of illnesses and methodology of therapies.[27]

The examples of "patient care" areas given in *St. John's*[28] are too limited. It is an unrealistic application of the term "patient care" to limit the areas in which patients receive care and therapy to only those areas of the hospital which laymen traditionally consider treatment areas. The Board simply cannot convert laymen ideas as to what areas of a hospital are to be considered "strictly patient

26. 22 NLRB 1150.

27. To attempt to classify all the potential therapies for all the various illnesses would be an impossible task even for a physician. The very fact that physicians adopt specialties is evidence of the incredible multiude of potential therapies that medical science has developed to combat the equally staggering number of patient sufferings. This complex situation is made even more difficult of broad classification when the different types of hospitals specializing in administering new and unique types of therapies is taken into consideration.

28. *I.e.*, "patients' rooms, operating rooms, and places where patients receive treatment, such as X-ray and therapy areas." *Supra* n. 12.

care areas" into a rigid standard applicable to each and every hospital.

The Board should decide what areas of a particular hospital are "patient care areas" only on a case-by-case method and only after considering evidence and testimony from the medical staff of the hospital which is charged with the duty of administering the proper therapy to the patients. Only a hospital's medical staff has the expertise to differentiate which areas of a hospital are devoted to patient care and which areas are not.

Although some generalizations can obviously be made as to what areas in a hospital are devoted to patient care (*e.g.*, operating rooms, patient rooms, recovery rooms, etc.), any idea that standard area designations can apply to each and every hospital, whether general care, psychiatric, geriatric, etc., to meet the multitude of potential therapies and treatment is totally unrealistic. Even with similar types of hospitals where identical treatments and therapies are administered to patients who share common ailments, similar hospital areas may carry different designations.

The Board simply is incapable of making rational decisions as to what areas in a hospital constitute "work areas" without the aid of expert medical testimony. Standard rules which classify differing areas of hospitals as "work" or "nonwork areas," regardless of the realities of each situation, and which are based upon nothing more than lay generalizations about hospital activity would be nonsensical in their application, causing tremendous impairment to the patient's well-being. A record as to what constitutes "work areas" must be made. Expert medical testimony must be utilized. Each case must be analyzed separately. Only then can the Board apply its presumptions about the invalidity of employer bans on solicitation

in "nonwork areas" during nonworking time. "Work area" must first be defined.

Any approach to the problem of defining "work area" other than that described above would not adequately protect the patient or hospital visitor. "Whenever in a hospital an emotionally vulnerable group of patients and their visitors may be present, we feel that unique considerations come into play which justify an otherwise overly broad no solicitation rule." *Baylor University Medical Center* v. *NLRB*, 578 F.2d 351, 356 (D.C. Cir. 1978).

> "The question thus presented, to strike an acceptable balance between employee solicitation under the Act projected against the concept of hospital patient care, is indeed difficult. A cautious judgment in such regard must note that error in such judgment may cause irreparable damage to patients, and thus to the public, while error in the other direction can be salvaged by the Board under proper use of its overall expertise in labor matters."[29]

"A patient's attitude toward the hospital and the likelihood of receiving expert care while there depends in part on whether he perceives the staff as concerned exclusively with patient care."[30] "In accommodating the interests of employers and employees in a hospital case the Board must recognize the employer's responsibility for the welfare of patients and other third parties present in the hospital."[31]

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29. *St. John's Hospital and School of Nursing* v. *NLRB*, 557 F.2d 1368, 1371 (10th Cir. 1977).

30. *NLRB* v. *Baptist Hospital, Inc.*, 576 F.2d 107, 110 (6th Cir. 1978). Although these quotes are from cases decided prior to *Beth Israel*, they, nevertheless, show the circuit court's concern with patient care and the difficulties that the courts have met in defining "work areas."

31. *Beth Israel, supra* n. 2, at 395.

IV. Insuring That the Board Utilizes Expert Medical Testimony in a Case-by-Case Approach Does Not Usurp Its Role.

In *Beth Israel*, this Court expressed its reluctance to accept arguments that the Board was not competent to decide whether solicitation or distribution would disrupt patient care. Specifically, this Court evinced its resolve not to allow the institutional role of the Board to be usurped by the health-care community.

> "It is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy. Because it is to the Board that Congress entrusted the task of 'applying the Act's general prohibitory language in the light of the infinite combination of events which might be charged as violative of its terms, *Republic Aviation*, supra, at 798, that body, if it is to accomplish the task that Congress set for it, necessarily must have the authority to formulate rules to fill the interstices of the broad statutory provisions."[32]

Requiring the Board to seek expert testimony from a hospital's medical staff on a case-by-case basis does not encroach upon the Board's institutional role. On the contrary, it enhances the Board's ability to fulfill the duties of that role.

In the health-care field, the industry's ability to produce a quality product directly and immediately affects the safety and well-being of human beings. Adjustments in federal labor policy necessarily affect the industry's ability to protect the patient. This human element compels Board consideration of a non-traditional factor—the industry's absolute obligation to protect the patient. Since only a hospital's medical staff can evalute this factor, it logically follows that the Board cannot fulfill its institutional role without considering the testimony of a hospital's medical experts.

32. *Beth Israel, supra* n. 2, at 385.

V. Alternatively, HCA Stresses That the Situation of the Health-Care Industry Requires This Court to Reconsider and Overrule Beth Israel.

A. The Patient Has a Right to Quality Medical Care

The cases which heretofore have been decided have dealt thoroughly with the traditional *Republic Aviation*[33] considerations—the competing rights of an employer to control his business and of the employees to engage in concerted activity.[34] There is a third consideration which has not been properly addressed. That consideration is the patient's right to quality medical care.

The patient's right to quality medical care is the critical factor which distinguishes the hospital industry from other industries which are subject to the *Republic Aviation* rationale. This right is a vital concern of all Americans. It is more important than the employees' organizational rights. It is more important than employers' proprietary interest in his workplace.

The patient's right to quality medical care has been unwillingly juxtapositioned between the competing and,

33. *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945).

34. "Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." *NLRB* v. *Babcock & Wilcox*, 351 U.S. 105, 112 (1956).

oftentimes, colliding interests of the employer and the employees. It is not a competing interest to be added to the *Republic Aviation* balancing test on equal par. It is a right which must remain sacrosanct from and unscathed by the traditional turmoil which results from a labor dispute.

No choice of words more succinctly states the relevant considerations in this case than the following passages from Justice Powell's concurring opinion in *Beth Israel*:

> The rule of *Republic Aviation* was adopted in the context of labor relations in industrial and manufacturing plants, where third parties unconnected with labor or management generally are not involved. In such a setting, it is relatively simple to divide the work environment into the two spheres defined in *Peyton Packing*.
>
> The rationality found to exist in *Republic Aviation*, and therefore the validity of the presumption, cannot be transferred automatically to other workplaces, for to do so would sever the connection between the inference and the underlying proof. The Court's approval of the *Republic Aviation* rule was based explicitly on the Board's considered appraisal of "normal conditions about industrial establishments." Conditions in industrial or manufacturing plants differ substantially from conditions in sales and service establishments where employees and members of the public mingle.
>
> * * *
>
> In my view, the presence of patients and members of the public in the hospital cafeteria removes the case from the framework established in *Republic Aviation*, just as the presence of customers has that effect in the Board's retail establishment cases. The hospital's function in serving patients, their families, and visitors is much like the retail establishment's function in serving its customers. That a nonprofit hospital does not share the profit motive of a retail establishment does not diminish the hospital employer's professional concern for the welfare of those in its care, including not only patients but also their friends and relatives who come to visit.
>
> It is true that the hospital's primary function is carried out in the immediate patient care areas, just as the retail establishment's main function is carried out on the selling floor. But the Board has applied its retail store rules to public restaurants on the premises of the retail store. See *ante*, p.3, notwithstanding the fact that the primary selling function does not take place there. Public restaurants in retail stores are provided for some of the reasons that hospitals maintain public eating places—including the convenience of the establishment's patrons. In addition, a hospital's more general purpose extends to, and pervades all areas of the hospital to which the public has access; it is not limited narrowly to the provision of technical medical treatment. Part of the hospital's function is to provide a "total environment . . . where the medical needs of patients are served by maintaining a climate free of strife and controversy." *NLRB v. Baptist Hospital, Inc.*, ... F.2d ....., ... (CA6 1978).
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> * * *
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> A presumption developed in and geared to the context of industrial establishments, which the Board has de-

clined to apply to retail stores, simply has no relevance to hospitals.

* * *

[T]he Board's "accommodation" of the competing interest in *St. John's* fails to give appropriate weight to the unique characteristics of a hospital. It amounts to no more than an application of the *Republic Aviation* rule to certain areas of a hospital but not others, despite the fact that members of the public are present and potentially affected even in areas of a hospital not characterized as "strictly patient care" areas.[35]

B. Proposed Rule

HCA submits that *Beth Israel* is inconsistent with the patient's right to quality medical care. The decision's approval of the Board's general approach in the health-care field permits narrow and illogical constructions of "work area." These interpretations stifle a hospital's ability to deliver its essential services. HCA respectfully urges that this Court instruct the Board to readopt the approach that the Board found suitable in *Guyan-Valley Hospital, Inc.*[36]

In *Guyan-Valley*, the Board approved the validity of hospital rules banning solicitation and distribution in areas of hospital to which patients and visitors have access. This approach is the best way to ensure that the patient's right to quality medical care is not jeopardized. Moreover, the Board cannot candidly argue that the approach is

35. *Beth Israel, supra* n. 2, 57 L.Ed.2d at 392-394 (Concurring opinion).

36. 198 NLRB 107 (1972).

totally inconsistent with the purposes of the National Labor Relations Act[37] when it approved and utilized the approach prior to its *St. John's* decision.

As pointed out in Justice Powell's concurring opinion in *Beth Israel*,[38] the Board's approach as adopted in *St. John's* is nothing more than the application of the *Republic Aviation* rationale to selected areas of a hospital. Application of this rationale should be removed from the hospital setting. The presumptions of invalidity which accompany the *Republic Aviation* rationale should similarly be discarded. "Once the Board is deprived of the presumptions of invalidity of an employer's rule, it must establish by substantial evidence on the record as a whole that the employer has violated §§ 8(a) 1 and 8(a) (3)."[39]

CONCLUSION

HCA urges that this Court overrule the narrow application that the Board has given its "general approach." Specifically, this Court should require the Board to approach each contested hospital no-solicitation/distribution rule on a case-by-case basis after proper consideration of the expert testimony of the hospital's medical staff. This case-by-case approach will aid the Board in fulfilling the duties of its institutional role.

Alternatively, HCA urges this Court to direct the Board to reject its general approach altogether and adopt

37. 29 U.S.C. 151 *et seq.*

38. *Beth Israel, supra* n. 2, 57 L.Ed.2d at 392.

39. *Beth Israel, supra* n. 2, 57 L.Ed.2d at 394-395 (Concurring opinion).

the earlier sanctioned guidelines approved in *Guyan-Valley Hospital.*

Respectfully submitted,

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